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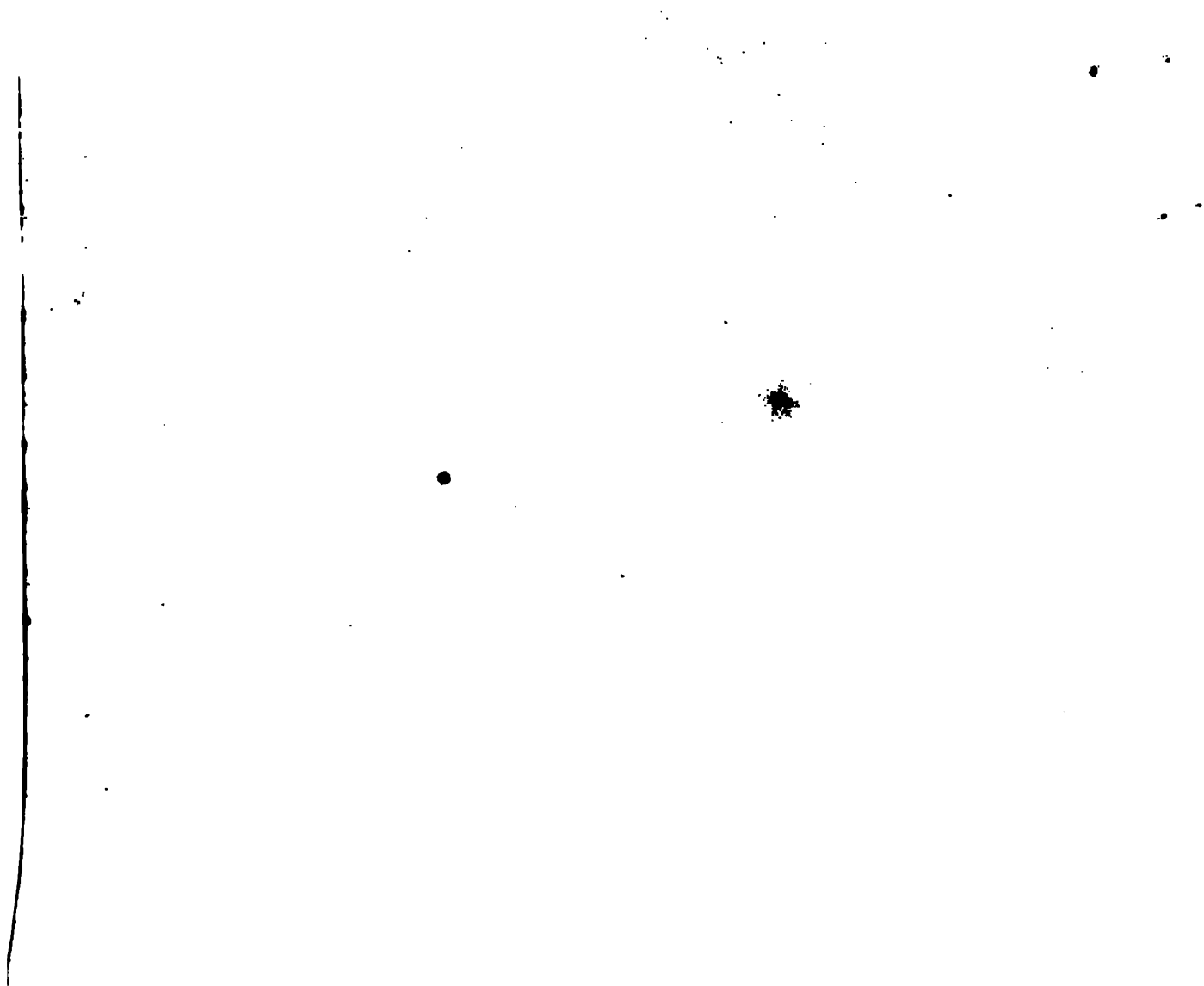
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DECISIONS
OF THE
LORDS OF COUNCIL AND SESSION,
FROM 1766 TO 1791.

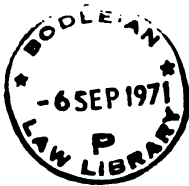
COLLECTED BY
SIR DAVID DALRYMPLE OF HAILES, BART.
LORD HAILES.

SELECTED FROM THE ORIGINAL MSS.
By M. P. BROWN, Esq. ADVOCATE.

VOLUME I.

EDINBURGH:
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MDCCCXXVI.



ADVERTISEMENT.

LORD HAILES was raised to the Bench in the year 1766 ; and continued to discharge his duty as a Judge until his death, which happened in 1792. The Reports and Notes now published extend from 1766 to 1791. They will be found, I hope, a useful Supplement to the Faculty Reports of the same period. The learned Judge, from whose papers they have been selected, is known to have been distinguished by habits of accurate observation, so as to be peculiarly well qualified for the task of faithfully recording the opinions delivered by his brethren. He had also, from his situation, the best opportunities of becoming acquainted with many circumstances which illustrate and explain the Decisions reported by him, but of which it frequently happens that no record exists in the printed pleadings.

In explanation of the plan which has been followed in this publication, I may mention, that Lord Hailes's MSS. contain notes of the opinions delivered by the Judges in a great many cases which are not reported in the Faculty Collection. The slightest glance, however, at some of those cases, was sufficient to satisfy me that the publication of them would be useless or improper. Others,

again, which, on looking merely at the notes of the Judges' opinions, seemed to be of some value, I have seen reason, on going through the session papers, to reject. In this way it has happened, that, out of a very considerable number of unreported cases contained in the MSS. to which I have had access, I have found only about thirty-two which appeared worthy of publication. In order to render the notes of the opinions of the Judges in such cases intelligible, it was necessary for me to prefix to each a statement of the averments and pleas of the parties, collected from the session papers.

By much the greater part of the present compilation, however, is occupied with the notes preserved by Lord Hailes of the opinions delivered by the Judges, in cases of which reports are already published in the Faculty Collection. In such cases I have contented myself with publishing the notes of the Judges' opinions, referring to the Faculty Reports for the facts and pleas maintained by the parties. These notes will be found, I hope, not destitute of value or interest, as the Faculty Reports of this period very seldom contain any statement of the grounds upon which the decisions of the Court were given. In estimating the authority of a decision upon a question of law, it is frequently of the utmost importance to have an accurate report of the opinions delivered upon the Bench, as well as of the argument maintained at the Bar.

Lord Hailes seems, at first, to have intended not merely to preserve notes of the opinions of the Judges, but also to make full reports of the statements and pleas advanced by the parties. Accordingly, the cases which stand first in the present volume, down to 27th November 1766, are executed upon this plan. From that date, however, he seems to have confined his labours to the preserving notes of what passed on the Bench.

The papers from which the cases now published have been selected, still remain in the possession of Lord Hailes's family, and have been communicated to me in the most liberal manner, by his daughter Miss Dalrymple of Hailes. The MSS. consist of six volumes, entirely in the handwriting of the learned Judge himself, besides a few loose papers.—The statements which I have prefixed to the cases, now published for the first time, have been drawn from the Session Papers.

Edinburgh, 12th May 1826.

ERRATUM.

At page 244, line 6, after "contain," insert *and*.



DECISIONS
OF THE
LORDS OF COUNCIL AND SESSION,
REPORTED BY
SIR DAVID DALRYMPLE, LORD HAILES.

1766. March 8. JANET MILLAR and OTHERS *against* MARY DICKSON, Widow
of GEORGE MUIRHEAD.

PRESCRIPTION.

Possession of Lands upon Infestments proceeding on Precepts from a Wrong Superior,
sufficient to give Right to the Subjects by the Positive Prescription.
The Possession of a Disponee joins to the Possession of his Author to complete Prescription.

[*Faculty Collection, Vol. IV. p. 367 ; Dictionary, 10,937.*]

THE parson's lands of the parsonage of Biggar belonged to the parson of Biggar, and were feued out by him in 1590. The proprietors of this feu made up their titles under the parsons of Biggar, as superiors; and particularly, in 1655, Mr John Muirhead, advocate, obtained a charter of resignation from the parson of Biggar, to be held of him and his successors. On this charter Mr John Muirhead was infest. In consequence of the 23d statute, Parliament 1690, concerning patronages, the superiority of the parson's lands became vested in the Crown. Nevertheless, in 1711, George Muirhead, grandson and apparent heir of Mr John Muirhead, the person last infest, instead of entering with the Crown, took a precept of *clare constat* from the Earl of Wigton, patron of the church of Biggar, for infesting himself and his heirs in the parson's lands, and upon this precept he was infest 3d May 1711.

On this erroneous title, and on it only, George Muirhead possessed for 39 years and nine months.

After his death, Mary Dickson, his gratuitous disponee, continued, though not infeft, to possess the parson's lands for three months more without challenge, whereby a peaceable possession of 40 years, from the date of George Muirhead's infeftment, was completed. Janet Millar and others, heirs of line, served and retoured to Mr John Muirhead, the vassal last infeft, under the parson of Biggar, insisted, in an action of reduction and declarator, for setting aside the right of Mary Dickson. In this action appearance was made for Lady Clementina Elphinstone, the heir of John Earl of Wigton, who claimed the superiority, as well as for Mary Dickson, who claimed the property of the parson's lands.

On the 6th August 1765, "On report of the Lord Elliock, the Lords found that the lands in question held of the parson of Biggar *qua* parson, and that the precept taken, and title made up, by George Muirhead, in the year 1711, was erroneous and void."

All parties acquiesced in this interlocutor, so that the remaining question to be determined between the pursuers and Mary Dickson, resolved into this:—George Muirhead was infeft upon a precept from a wrong superior: upon this single title he possessed for 39 years and nine months, and his disponee completed the possession of 40 years before any challenge was brought,—Whether did George Muirhead and his disponee thereby acquire right to the lands by positive prescription.

ARGUMENT FOR THE PURSUERS:—

The pursuers pleaded, *1mo*, An apparent heir cannot gratuitously dispone his estate. George Muirhead lived and died in a state of apparenacy, so therefore he could not gratuitously dispone his estate. Here the only proposition requiring proof is, that George Muirhead lived and died in a state of apparenacy.

It has been determined, by a judgment of this Court, to which Mary Dickson herself was a party, that the Crown became superior of the parson's lands in 1690, was superior in 1711, and so continues unto this day. It has, in like manner, been determined that the title in 1711, derived from the Earl of Wigton, was erroneous and void. From this it follows, that the lands have been in non-entry ever since the death of Mr John Muirhead, the vassal last infeft under the true superior: and that the Crown might at any time, during the life of George Muirhead, have insisted in a declarator of non-entry against him, and have compelled him to enter as its immediate vassal. If, during the life of George Muirhead, the Crown had no vassal, and if it might have insisted against him in a declarator of non-entry, then during his life George Muirhead was no other than an apparent heir.

Hence, also, it is impossible that any one can make a title to this estate by connecting himself with George Muirhead: On the contrary, he must connect himself with Mr John Muirhead, the vassal who died last infeft under the parson of Biggar. It may be admitted that the onerous deeds of George Muirhead would have been effectual in consequence of his title of possession, but it will not from thence follow that his gratuitous deeds are equally effectual. The law has established registers for the security of onerous credi-

tors, not of gratuitous disponees. When it appears, from the registers, that one has an infeftment on a warrant apparently valid, continued and unchallenged for 40 years, an onerous creditor is not bound to inquire farther back into the title of the superior, by whom such infeftment was granted. When an onerous creditor uses all the precaution that is incumbent on him, he is thereby secured in law: but the case of a gratuitous disponee is different. He does not advance his money, he does not contract, he has no occasion to look into the registers, nor indeed were they established for his security; and thus the titles in George Muirhead might be sufficient, by positive prescription, to validate his onerous deeds, though not his gratuitous.

2do, The positive prescription, here pleaded, is not properly qualified in terms of the statute 1617.—That statute, which introduced the positive prescription, has also described the titles requisite thereto. It requires that singular successors, such as Mary Dickson, produce a charter granted, to them or their predecessors, by their superiors or authors, preceding the entry of the 40 years' possession, with the instrument of seasine following thereon. Mary Dickson, in support of her plea of the positive prescription, must produce such title as the statute requires. Now she has not produced any charter of the lands, preceding the entry of the 40 years' possession; which, however, the statute expressly requires to be produced. It may be acknowledged that a disposition, or any other deed importing a conveyance of property, is held as equivalent to a charter: but a precept of *clare constat* is no such deed. It is not a conveyance of lands, but a warrant to deliver possession of lands, whereof the property is supposed to have been formerly conveyed.

3tio, Mary Dickson cannot plead possession in terms of the statute 1617. George Muirhead had two titles in his person,—that of apparent heir, which was unexceptionable; and that upon the precept and infeftment 1711, which has been found erroneous and void.

His possession commenced on his apparenacy. It will not be presumed in law that he intended to invert the cause of his own possession, to sanctify his error in taking infeftment from a false superior, to prejudice his true superior, and to expose himself and his heirs to the consequence of disclamation. His possession therefore must be imputed to his apparenacy, which was a title safe and unexceptionable; not to the precept of seasine, which was a title exposed to danger, and erroneous in itself. In this view of the case George Muirhead never possessed upon a charter, even supposing the precept of *clare constat* to be equivalent to a charter; and so there is no room left for the plea of positive prescription by the statute 1617.

4to, Prescription supposes two things, 1st, That the person who prescribes is acquiring something; 2d, That he is acquiring in a manner agreeable to the title on which he founds. Now, 1st, The prescription supposed to have been running during the life of George Muirhead, was no *acquiring* prescription. George Muirhead was the undoubted heir of his grandfather; his right, if formally completed, would have given him the absolute property of the parson's lands: by his titles, 1711, he could acquire no better right than what was inherent in him. Positive prescription is *adjectio dominii per continuationem possessionis*: When nothing can be acquired, there can be no *adjectio dominii*. Indeed, this would have been a losing rather than a gainful prescription; for

thereby George Muirhead would have changed the Crown for a subject superior. 2d, If, in positive prescription, one must acquire in a manner agreeable to the title on which he founds, then the only thing which George Muirhead could have acquired, was a right to hold the lands of the Earl of Wigton; but the Court has found, that his title for this is void, so that there was nothing which he could acquire upon that title. But granting that prescription were, in this case, qualified by a proper title, and supported by the possession requisite, such prescription cannot be pleaded against the pursuers. In prescription, there are required, 1st, A person against whom it may run; 2d, A right which that person has in him, but which he is losing by the course of prescription; 3d, A power in that person, whereby he may interrupt the prescription. Now, in this case, there is none of all these requisites. As to the *first*, during the life of George Muirhead, there was no person against whom prescription could run. Although he might have prescribed against extraneous persons, he could not against himself nor against his right heirs, who were named in the precept and infeftment. Where all the titles in the proprietor stand unlimited to heirs-general, he cannot prescribe upon one title against another. And so it was expressly determined, 12th November 1751, *Gray against Smith*. As to the *second* and *third*;—During the life of George Muirhead, there was no right in the heirs which they could lose. Where an estate is an entailed, there is a right vested in the heirs, and there is an obligation to them on the proprietor: the heirs may make this right effectual by action, or may lose it by omitting to bring such action, and the proprietor may be relieved from his obligation by means of the negative prescription, if the heirs do not insist against him. Upon this principle the cases Mackerston, Kirkness, and Kinaldie were decided. But where an estate is not entailed, there is no more than a hope of succession in the heirs: they cannot insist in action for having their hope of succession declared and secured; nor is the proprietor under any obligation to them, whereof he may be relieved by the negative prescription.

ARGUMENT FOR THE DEFENDER. The statute 1617 introduced positive prescription, for quieting the minds of possessors, for terminating contentions, and for securing property. A law so salutary ought not to be narrowed by interpretation. According to the pursuer's argument, if but one heir should be as ill advised in making up his titles as George Muirhead was, all subsequent heirs, for a thousand years, would remain in a state of apparency, and, of consequence, all their marriage settlements would be void: and supposing the statute 1695 not to have passed, all their onerous contracts would be equally void; and even the statute 1695 would only save the creditors of such apparent heirs as had possessed for three years. But more particularly, in answer to the pursuer's plea, they urge, "That George Muirhead, notwithstanding his infeftment, lived and died in a state of apparency." This is so far true, that, as he did not live to complete the prescription of forty years, he could not be said to have acquired the property of the lands. But this is the case of every one infeft upon a charter or disposition from a person not having right until possession for forty years is completed. The pursuers, however, admit, "That George Muirhead might, upon the title of his onerous infeftment, have acquired a right to the lands sufficient for validating his onerous deeds." This admission is fatal to their argument; for positive prescription, if it gives

any right, gives a right of property, and must thereby validate deeds gratuitous as well as onerous. *Secundo*, The pursuers urge, "That George Muirhead could not prescribe upon the first alternative of the statute 1617; for that the statute requires, for title, a charter and seasine, to which a precept of *clare constat* and seasine are not equivalent." It is answered, That, according to the established interpretation of the statute 1617, a procuratory of resignation, precept of *clare constat*, or any warrant for the seasine, is accounted equivalent to a charter. From the pursuers' argument, it follows, that, if George Muirhead had been infeft upon a disposition from the meanest of the people, whom he knew to have no right, he could have acquired by prescription, although he could not when infeft upon a precept from the Earl of Wigton, whom he considered as his superior in the lands. Whereas, were there any difference between a precept of *clare constat*, and any other warrant for taking infeftment, the preference ought to be in favour of the precept of *clare constat*; for it is more equitable to favour him who takes an estate as belonging to his predecessor, than him who takes a disposition from one having not so much as a putative right therein. The meaning of the statute 1617 is plain. When there is produced a warrant for the seasine, such as a charter, procuratory of resignation, or precept of *clare constat*, then a possession of forty years is sufficient; and although the person infeft should die before the lapse of the forty years, no new seasine is required in his heir, or in any other person continuing to possess under his right. But when a seasine, proceeding on a retour or precept of *clare constat*, is produced, without the retour or precept which is the warrant of such seasine, then there is required, by the statute, continued possession for forty years by the person infeft; or, if he die before the lapse of that period, another seasine in the person of his heir or disponee. *Tertio*, As to what is urged for the pursuers, "That George Muirhead must be held to have possessed upon his apparency only, not upon his infeftment," it is plainly an erroneous plea. Apparency is no title of property, and he who entered upon a precept of *clare constat*, can never be supposed to have declined the connecting himself with his predecessor last infeft, or to have sought to be considered in any other light than that of a proprietor infeft. *Quarto*, As to what is urged, "That George Muirhead could not prescribe, because he could acquire no better right than what was inherent in him as heir to his grandfather," it is answered, That this argument proceeds upon the erroneous supposition, that the positive prescription, like the negative, must run against a particular person, who loses what the other acquires, and who is *valens agere* to interrupt the prescription. The positive prescription is *adjectio domini per continuationem possessionis*: it inquires not whether there is one who loses what the other gains, nor whether the loser was *valens agere* or not, excepting always the single case of minority. The negative prescription, on the contrary, does of necessity suppose a person who loses his right, by neglecting to prosecute it for forty years, and, of consequence, requires that such person be *valens agere*. But, if it were necessary to point out the particular persons against whom George Muirhead did acquire a right by positive prescription, it is answered, that they were the heirs of his predecessor: It varies not the case that the title of the heirs of George Muirhead and of his predecessors happened to center in the same persons. These heirs lost, by the

negative prescription, the right which they would have had to take the estate as heirs to his predecessor, and to set aside his gratuitous deeds; and they were *valentes agere* by a process of declarator. Thus George Muirhead gained, by prescription, a feudal right to the estate, and consequently the power of disposing it gratuitously: the heirs of his predecessors lost, by prescription, the right of taking up the estate as *in hæreditate jacente* of George's predecessors, of passing George by, and of disowning his gratuitous deeds. The case, *Gray against Smith*, is not in point. There the heirs who possessed had two rights in their person, one by service as heirs of line, the other by disposition. And when a man has two rights in his person, there seems no reason for setting up the one as a title of prescription to overthrow the other. If the disposition could overthrow the service, the service might overthrow the disposition, and *vice versa*. But, here, George Muirhead had but one right to the parson's lands, his infeftment upon the precept 1711.

On the 6th August 1765, "The Lords repelled the defence of prescription, and decerned."

On the 7th February 1766, "The Lords found the precept of *clare constat*, with infeftment thereon, in favour of George Muirhead, is a habile title for prescription: found it competent for the defender, in this case, to found upon her own and George Muirhead's possession, in order to make out her plea of prescription; and repelled the pursuers' objection thereto, founded on the precept of *clare* being granted by a wrong superior, in respect prescription is sufficient to sopite that defect."

On the 8th march 1766, upon advising a reclaiming petition with answers, "The Lords adhered."

Act. G. Wallace. A. Lockhart. *Alt.* J. Burnet. *Rep.* Elliock.

The Judges had given their opinions at full length when this case was formerly under their consideration: they did not resume their opinions at the last advising, only the President declared that he differed from the judgment of the 7th February, and was for returning to the judgment of the 6th August 1765.

1766. *March 8.* CAPTAIN ROBERT CAMPBELL of Monzie, and OTHERS, *against* MAJOR ALLAN MACLEAN, late Commandant of the 114th Regiment.

JURISDICTION.

The Court of Session competent to try a question among the officers of a disbanded Regiment, involving pecuniary interests, although arising out of military transactions.

IN 1761, Captain Allan Maclean was appointed major commandant of a corps then to be raised. His instructions from the secretary of war, bore, "That the proposed major and captains should sell their present commissions: That the captain-lieutenancy should be sold: That the money arising from such sales should be thrown into a fund: and that no other levy money was to be

"allowed." The corps was raised. It was disbanded at the peace. The officers were put upon the half-pay list. Captain Robert Campbell, and others, officers in this corps, insisted in an action against Major Maclean, calling him to account for that proportion of the aggregated fund arising from the sale of commissions, which they contended did belong to them, in consequence of the instructions from the secretary at war, for defraying the expense of their respective levies.

ARGUMENT FOR THE DEFENDER,—Major Maclean contended, for certain reasons by him urged, That the pursuers had not right to any proportion of this aggregated fund. But he separately objected to the jurisdiction of the ordinary courts of justice, and he pleaded, that, although the law has in general subjected soldiers to the ordinary courts of justice in questions as well criminal as civil, yet, with respect to the various military questions which necessarily arise in the army, the law has provided that they shall be tried by military courts, or be determined by those whose province it is to direct the affairs of the army. Thus the Act for punishing mutiny and desertion, at the same time that it empowers the King to issue other regulations for the better government of his forces, provides, section 17, That every commissioned officer, &c., that shall embezzle, &c., any provisions, &c., shall be tried before a general court-martial, and, upon conviction, shall be dismissed the service, and forfeit £100 sterling. And such offender to make good the loss thereby sustained, "to be ascertained by the court-martial; "which shall have power to seize the goods of the person so offending, and sell "them for the payment of the £100 and the damage. If sufficient goods cannot be seized, he shall be committed to prison, to remain there until he pay "such deficiency." Thus also, by the articles of war, drawn up in consequence of parliamentary authority, sec. 12, "Of redressing Wrongs;"—"If any officer "shall think himself wronged by the commanding officer of the regiment, and "shall, upon due application made to him, be refused to be redressed, he may "complain to the general-in-chief, in order to obtain justice, who is hereby "required to examine into the said complaint, and, either by himself or our "secretary at war, to make report to us thereon, in order to receive our farther direction." Every officer, who apprehends himself wronged by his commander, has two different remedies competent to him by the Mutiny Act and the articles of war. 1st, A court-martial, either general or regimental. 2d, An application to the commander-in-chief, or secretary of war: and, in either of those cases, the person offending will be obliged to make reparation out of his effects; and, if they are not sufficient, by the sale of his commission.

But farther, The question between the parties depends upon the construction of certain orders, issued by the secretary at war, concerning the application of money in such manner as should be directed by the King. If there be any ambiguity in those orders, they must be explained either by the King or his secretary at war.

ARGUMENT FOR THE PURSUERS,—Although the claim of the pursuers arises from a military question,—the raising of a regiment,—yet it is a civil claim. Thus many civil actions arise from the commission of crimes, although the crimes themselves can only be prosecuted before a court having a proper criminal jurisdiction. An officer may be liable to trial in a Court-martial for malversation in his military character: but a claim of damages, arising to a third

party from such malversation, is actionable in the ordinary courts of law. A court-martial cannot execute its own sentence *quoad civilem effectum*; the civil magistrate is not bound, and indeed dares not interpose his authority to the execution of such sentence. It follows, that redress can only be obtained by a legal action before the ordinary courts of law. It may be doubted, and it has been doubted, whether a court-martial can grant even military redress against an officer after his regiment is disbanded, and himself put upon half-pay. If he should refuse to acknowledge such jurisdiction, the only consequence will be, the striking him out of the half-pay list; but this would afford no satisfaction to the complainer. The effects mentioned in sec. 17 of the mutiny Act, are military effects and no other. The sec. 11, of the mutiny Act, is conclusive in favour of the pursuers, "That nothing in this Act contained shall extend, or be construed to exonerate any officer or soldier whatsoever, from being proceeded against by the ordinary course of law." Hence also, in sec. 49, a fine of £100 imposed, is made payable, upon a suit, "in any court of record." And, in sec. 38, a penalty of £5, for the use of the poor, is appointed to be levied by distress, in consequence of "a warrant under the hand and seal of a justice of peace." The sec. 12 of the Articles of War is a salutary regulation for obtaining justice, in so far as it can be awarded by a court-martial. But, supposing that the pursuers had sought for and obtained a court-martial against Major Maclean, and the sentence of that court had cashiered him, all this would not have forced him to refund the money in question. With respect to the ambiguity in the orders which, it is contended, ought to be explained by the King, or his secretary at war, like ambiguities daily occur in Acts of Parliament; and yet the courts of law determine thereon, instead of leaving them to be explained by the legislature.

30th July 1765, The Lord Stonefield, Ordinary, "sustained the defence founded on the incompetency."

21st November 1765, Upon advising a representation with answers, "he adhered."

8th March 1766, "The Lords, upon advising a petition and answers, remitted to the Ordinary to find the action competent."

Act. A. Lockhart. Alt. Ilay Campbell.

1766. March 8. CHRISTIANA CHALMERS against INNES and HOPE, Merchants in London.

[Faculty Collection, v. IV, p. 58, Dictionary 3489.]

MANDATE.

Mandatory is directly liable to the mandant, and is not entitled to place a sum recovered for him to his own credit in account with a third party, at whose desire he accepted the mandate.

CHRISTIANA CHALMERS had right to L.24 sterling of prize money and wages due to her deceased son, a sailor. In consequence of the advice and recommend-

ation of Young, a merchant in Stromness, she granted a letter of attorney to his correspondents, Innes and Hope, merchants in London, empowering them to receive the money. She delivered this letter to Young, and he transmitted it to Innes and Hope. Innes and Hope notified to Chalmers that they had received the money, and had placed it to the credit of Young. Chalmers brought an action against Young, concluding for payment.—His defences were, that he was not employed by Chalmers to receive the money, nor did he receive it: That, although he recommended, it was Chalmers who employed Innes and Hope as her attorneys: That consequently he himself could not be liable in payment of money which he had never received, nor for the intromissions of those he had never employed.

Process against Young was sisted until Innes and Hope should be called. Chalmers brought an action against them concluding for payment.

ARGUMENT FOR THE DEFENDERS.—He who undertakes to execute powers of attorney, does it from the confidence which he reposes in the person transmitting such powers; is understood to contract with him, and, according to the custom of merchants, is answerable to him. Were the case otherwise, no man would undertake to execute such commissions, and thereby become answerable to persons utterly strangers. Had the letter of attorney been transmitted directly by Chalmers to Innes and Hope, they would not have accepted of the trust, for they knew nothing of her, nor had they any security from her for their indemnification; but, as the letter of attorney was transmitted to them by Young, their correspondent, they accepted of the trust. Young was in effect employed by Chalmers. Innes and Hope might have paid the money to him, and they did what was equivalent, by crediting him with the money which they received; and if Young omitted to account with Chalmers, he omitted to do his duty.

ARGUMENT FOR THE PURSUER.—The pursuer might have given the letter of attorney to Young, and authorised him to delegate. In such a case, Young would have been directly accountable to her; but, in fact, she gave him no powers: he was nothing more than a hand to transmit the letter of attorney from her, the mandator, to Innes and Hope, the mandataries; nor could they run any hazard in executing the trust and receiving the money, for they could always indemnify themselves by retention, and were bound to account for no more than the balance. If they could pay her by passing the sum to Young's credit, then a mandatory, instead of accounting with his constituent, may account with the person by whose recommendation the mandate was given, and will thus pay himself, not his constituent. "The Lord Gardenston, Ordinary, having considered that the pursuer's power of attorney was a direct commission to Innes and Hope to levy her son's wages, which commission they accepted of upon the recommendation of Young, therefore FOUND that the defenders are accountable to the pursuer; without prejudice to the defenders to claim a full indemnification from Young, in case they shall make it appear, on accounting with him, that he was in cash to pay the demand."

Upon advising a reclaiming petition and answers, "The Lords adhered, and found expenses due."

Act. W. Oliver. Alt. Arch. Cockburn.

OPINIONS.

COALSTOUN. The money might have been paid by the defenders to Young : they did the same thing by giving credit for it.

GARDENSTON. No powers were given to Young.

KAIMES. Young comes in here only in consequence of his gratuitous offer to transmit the power of attorney. Young is no party.

AUCHINLECK. A letter of attorney may be given to one who may delegate.

PRESIDENT. The defender's plea is dangerous ; for, according to it, a London merchant, or any other merchant at a distance, would, in consequence of a simple recommendation, always pay himself first for any debt due by the person recommending.

1766. *March 11.* JOHN PATULLO, Writer in Edinburgh, Trustee for the Creditors of Allan Livingstone, *against* CHARLES and ELIZABETH LIVINGSTONE.

PROVISION TO HEIRS AND CHILDREN.

The Bar-keeper of the Faculty of Advocates, whose office is held during pleasure, having resigned, upon an arrangement that his successor should pay him an annuity during his life, and a sum of money to his children upon his death,—Found, that this last mentioned sum could not be attached by his creditors after his death, but belonged to the children.

ALLAN Livingstone enjoyed the office of bar-keeper to the Faculty of Advocates. His commission was during pleasure. On the 4th February 1764, he resigned his office on account of his infirmities ; but, at the same time, he prayed that he might be allowed to retire in such a manner as not to be left destitute in his old age. This resignation being made, John Hay, late merchant in Edinburgh, was suggested in Faculty as a proper successor to Livingstone. The Dean and his council were named as a committee to settle such terms of agreement between Livingstone and Hay as should appear equal and reasonable. On the 24th February 1764, Hay became bound to pay to Livingstone an annuity for life of L.70 sterling, and to his children the sum of L.200 sterling, at the first term after his death. Next day, the Dean reported to the Faculty that the committee had settled an agreement between Livingstone and Hay in such a manner as appeared equal and reasonable ; and Hay was elected bar-keeper during pleasure. Livingstone enjoyed the annuity of L.70 during his life. Upon his death, his children received the L.200. In an action before the Commissaries of Edinburgh, Patullo, trustee for the creditors of Livingstone, insisted against his children as representing him. The Commissaries " Found, that, as the bond expressly bears to have been granted in consideration of the deceased Allan Livingstone resigning his office of bar-keeper to the Faculty of Advocates ; that the said Allan Livingstone could not take the sum of L.200 sterling, therein contained, payable to the defenders, his children, to the prejudice of his own lawful creditors ; and, therefore, found the defenders liable to the

pursuer in payment of the sums libelled, *in valorem* of the said L.200, and decerned." The cause was brought by advocacy before the Court of Session.

ARGUMENT FOR THE PURSUER.—Patullo, trustee for the creditors, pleaded : That Hay was admitted in consequence of the valuable consideration of L.200, which he became bound to pay. Livingstone himself made the transaction, and it must be understood to have been for his benefit. The L.200, then, must be considered as having been once *in bonis* of Livingstone, and from him *gratuitously* transmitted to his children,—they must therefore be liable for his onerous debts to the extent of that sum.

2do, The obligation was delivered to Livingstone, and remained in his custody until his death : it must therefore be considered as a fund whereof he had the disposal ; and, of consequence, it must go for payment of his onerous debts.

ARGUMENT FOR THE DEFENDERS.—The children of Livingstone answered,—That their father possessed his office during pleasure. The office itself could not have been adjudged by his creditors, nor its emoluments effectually arrested. The sum of L.200, which was stipulated upon his resignation, was destined by the Faculty of Advocates for the use of the children of their old servant : it never belonged to Livingstone,—it could not have been levied or discharged by him, and, consequently, it cannot be attached by the diligence of his creditors.

On the 4th February 1766,—“ The Lord Auchinleck, Ordinary, advocated the process, and found, that, as the office held by the deceased Allan Livingstone, during the pleasure of the Faculty, was not affectable by the creditors of Allan Livingstone ; the L.200, payable to his children on his demitting that office, was not affectable for his debt ; and therefore assoilyied the defenders, and decerned.

On the 15th February, 1766, upon advising a representation for the creditors, the Lord Ordinary,—“ In respect of the reason assigned for the former interlocutor, and in respect that although the creditors of Allan Livingstone could have affected the emoluments of his office had he continued to hold it, and that he ought, out of regard to justice, to have held it, and when he quit it, taken care to make the consideration be secured in such manner as that his onerous creditors might have been paid, yet the creditors had no legal compulsitor against him to hold it, nor legal right to what was given to his children on his resignation ; and therefore adhered to the former interlocutor, and refused the desire of the representation.”

On the 28th February, and 11th March 1766,—The Lords “refused” two several petitions for the petitioner, D. Græme. The general opinion of the Court was, That, by Allan Livingstone’s transaction, *nihil deest* to his creditors, and, consequently, that their action was groundless.

1766. June 13. WILLIAM DODDS, Messenger in Glasgow, *against* ROBERT WOOD, Baker in Glasgow.

HUSBAND AND WIFE.

The presumption that a purchase made by a wife, *stante matrimonio*, is made with the husband's money, is not an invincible presumption.

ON the 9th March 1755, Ann Alison, the wife of William Dodds, purchased certain tenements in Glasgow, from Andrew Miller, and took the disposition thereof to herself, her heirs and assignees whatsoever.

On the 2d April 1755 Ann Alison was, in these terms, infeft in the tenements thus purchased. In 1756, Ann Alison, with consent of her husband, insisted in a process before the Dean of Guild at Glasgow, for payment of certain repairs laid out upon the common gavel of the foresaid tenements. In this process, it was said, on her part, that she was proprietor of the subjects, and that her husband, William Dodds, had laid out the expense of those repairs. In this process appearance was made for Robert Wood, baker in Glasgow, as trustee for the creditors of Andrew Miller. About the end of the year 1762, Ann Alison died. At that time William Dodds, younger, her eldest son, and heir-at-law, was abroad. In 1763, Robert Wood, baker in Glasgow, as having right to Miller's subjects, insisted, in an action against William Dodds elder, and others, for removing them from the tenements which had been purchased by Ann Alison: This action proceeded upon the erroneous supposition that those tenements were contained in the right derived to Wood from Miller, the common author. In this action, William Dodds, elder, pleaded that the tenements had been the property of Ann Alison, his deceased wife, and were expressly comprehended in her seaisine: he disclaimed all right in the subjects, and insisted that he was not the heir of Ann Alison, and that her heirs were the proper defenders. In proof of all this, he appealed to Ann Alison's seaisine produced in process. William Dodds, younger, on his return to Glasgow, made up titles, as it is said, to his mother Ann Alison: Certain it is that he conveyed the liferent of the greatest part of the foresaid tenements to William Dodds, his father. William Dodds, younger, sold a small part of the tenements to Robert Wood, and, on the 27th September 1764, granted him a disposition thereof. On the 19th October 1764, in virtue of this disposition, Robert Wood, the purchaser, was infeft. Robert Wood warned William Dodds, elder, to remove: Dodds presented a bill of suspension, which was passed. William Dodds, elder, insisted in an action against Robert Wood, calling for production of the disposition granted by Andrew Miller to Ann Alison; of the seaisine following thereon; of the service and infeftment of William Dodds, younger, as heir to his mother; of the disposition granted by him to Robert Wood; and of the seaisine following thereon: He concluded, that they should be all reduced, and that it should be declared that he, the pursuer, had the only right to the subjects, in respect that they were purchased by his wife *stante matrimonio*, and must of consequence be presumed to have been purchased with his money, and for his

behoof. The suspension and the reduction were taken to report by the Lord Barjarg, Ordinary.

ARGUMENT FOR THE PURSUER :—

A woman, *vestita viro*, is presumed by the law of Scotland to have nothing of her own. If, during the subsistence of the marriage, she becomes possessed of any money, or purchases any subjects, it will be presumed that the money is her husband's, and that the subjects are purchased for his behoof, unless she prove that the money was her own, or the subjects acquired with her own money not falling under the *jus mariti* of her husband. Thus, money lent or deposited by a wife, *stante matrimonio*, was presumed to belong to the husband, and an action in his name was allowed for repetition of it, 17th November 1685, *Fenton* against *Carnegie*; and 31st January 1727, *Rigg* against *Cuninghame*, Dict. vol. i. p. 388. In this last case the husband was not so much as obliged to show that his wife had intromitted with any of his money: but such intromission was presumed, unless the wife could point out a separate fund of her own from which the money might have arisen. Here, the defender, Wood, has not pretended to show that Ann Alison was possessed of any separate fund whatever, and therefore the authority of the foresaid decisions is express in support of the pursuer's plea. The tenements must be presumed to have been purchased with the pursuer's money, and for his behoof. The right, taken in name of the wife and her heirs, could only subsist in her person as a trust for her husband; and, as she could not defeat his right, so neither can her heirs.

ARGUMENT FOR THE DEFENDER :—

The rights of husband and wife, by the law of Scotland, are not founded on presumption: their respective interests are established according to the nature of the subjects in communion. All moveable subjects are, *stante matrimonio*, the property of the husband; heritable subjects, left exclusive of the husband's right, or subjects in their nature paraphernal, are the property of the wife. The subjects in question, being heritable, were indisputably exclusive of the husband's right. Though purchased *stante matrimonio*, it follows not that the money belonged to the husband, or, if it did, that he can on that account reduce an heritable right to them clothed with infestment and conveyed to a third party. A wife may have money exclusive of her husband's right, either secured to her by bond, or conveyed by donation, or bequeathed by legacy; and, although she should alter the form of her security, and convert her right into money, it does not thereby become the property of her husband *jure mariti*, provided that she either vests or intends to vest it in the purchase of an heritable subject. Hence, if it be doubtful what was the former state of money laid out by the wife upon heritable security, that state must be collected and determined by circumstances as they occur; and from them the money will be held to have been the property of the husband or the wife. In the present case all circumstances concur to show that the money was the property of the wife: The right in the subjects was taken to the wife and her heirs. Of this the husband was not ignorant: In 1756 he asserted that the subjects belonged to her: in 1763 he disclaimed all right in them, and insisted that they belonged to the heirs of his wife: in 1764 he accepted of a liferent-right of part of those very subjects from that heir whose title he now disputes. Had he expressly consented to the disposition in his wife's favour, there could have been no doubt in the question: homologation is equivalent to consent, and acts

of homologation, weaker than those above mentioned, have been held equivalent to consent.—Thus a husband, by subscribing *witness* to a ticket of a few lines granted by his wife, was held to have consented thereto.—*Fountainhall*, 6th January 1686. Thus a husband, pleading before an arbiter on a submission entered into by his wife, was barred from objecting nullity to that submission, 20th January 1735, *Telfer* against *Hamilton of Grange*. Thus also a woman, *vestita viro*, having purchased a tenement and taken the right thereof to herself in liferent, and to a daughter of a former marriage in fee, the husband's consent was inferred from his giving *seasine* thereon as bailie.—*Stair*, 29th January 1668, *Brown* against *Happiland*. Were such presumptions not sufficient, many fatal consequences would ensue, destructive of the common intercourse and trust between man and man; for how can third parties, after the lapse of many years, be able to point out the particular money with which a wife has acquired an heritable subject? They know that a wife may have subjects exclusive of the husband's right; they see that an heritable right to a subject stands vested in her and her heirs, and that by a public infeftment known to her husband. This is all the knowledge that purchasers can have, and from such knowledge a presumption arises that the subjects were purchased with the proper effects of the wife, and by her habilely conveyed to her heirs. But, even supposing that the purchase-money had belonged to the husband, this will not avail the pursuer in his action of reduction. Upon that supposition the money may be considered as *donatio inter virum et uxorem*, and so revocable; hence the right of the pursuer will resolve into a personal claim against the heir of Ann Alison, for re-delivery of the money; but his right can never come in competition with the real right of the defender which is clothed with infeftment. The complete real right in the subjects can no more be set aside as flowing from a *donatio inter virum et uxorem*, than it could be set aside by any personal back-bond granted by the wife or her heir. Besides, the real right did not flow from the husband, but from Miller, of whom the wife acquired it.

Reply for the pursuer:—

The most express homologation could not hurt the pursuer's plea. Had he homologated, a preceding *donatio inter virum et uxorem* might have been inferred; but such donation, however homologated or ratified, is in its own nature revocable. Further, in the two actions 1756 and 1763, the pursuer had no occasion to distinguish betwixt his own right and that of his wife: His plea, that the subjects had been sold by Miller, was equally conclusive, whether the right was in him or in his wife; and his founding upon his wife's infeftment, in an argument with third parties, did not imply any acknowledgment that the subjects were acquired by her money and for her behoof. The case *Brown* against *Happiland* is not in point; for there the fee was not taken to the wife, but to a third party. A right taken to a third party could never accresce to the husband; and therefore, if he witnessed such right, and objected not, he must be presumed to have consented to it: but, when a right is taken to the wife herself, the husband needs not object, because he knows that it will accresce to him, or that he may at any time recal it as a *donatio inter virum et uxorem*. *Adly*, As to the allegation that the pursuer's claim does at any rate resolve into a personal claim against the heir of the wife, and that the purchaser from that heir is secure;—It is answered, That as every purchase made

by a wife is presumed to have been made with the husband's money, unless the contrary is proved, so the purchase itself does accresce to the husband; nor can the wife, or her heir, dispose of it without the consent of the husband; and if it shall be supposed that the pursuer consented to the right conceived in favour of his wife, then it is plainly a *donatio inter virum et uxorem*, which is at all times revocable, even against a singular successor, from the wife or from her heirs. *Sdly*, There is no resemblance between this case and that of a latent unrecorded back-bond. Such latent back-bond cannot qualify or limit an infestment upon record, and thereby prejudice a purchaser. But, here, the pursuer's plea is founded on a quality inherent in the nature of the right, which bears to be granted to a wife *stante matrimonio*: the records give security against burdens and incumbrances not recorded, but they give no security against objections to the validity of the author's title.

"The Lords repelled the reasons of reduction; found the letters orderly proceeded, and found expenses due."

Act. R. M'Queen. *Alt.* Alex. Murray. *Reporter.* Barjarg.

OPINIONS.

AUCHINLECK. Here there is a trick committed by Dodds: he suffers the subject to be considered as belonging to his wife till after the sale, and then he claims it as belonging to himself.

PITFOUR. The presumption that a purchase made by a wife, *stante matrimonio*, is made with the husband's money, is not an invincible presumption. Here, as the husband pleads upon the wife's right, he must hold by the narrative of the right, namely, that she had paid the money.

KAIMES. If the wife had got the money from the husband, the money might have been recalled by the husband; but it does not from thence follow that the subject purchased with such money might also have been recalled by the husband; much less can the subject be recalled from a singular successor acquiring for a price.

PRESIDENT. After the husband's repeated acknowledgments that the subject belonged to the wife and her heirs, there is no place left for repetition.

1766. June 13. ALEXANDER MUDIE *against* JOHN OUCHTERLONY and the OTHER CHILDREN of the deceased Alexander Ouchterlony, Provost of Aberbrothock.

PROOF.

One person having purchased, at a Public Sale, a House for another, by verbal order, a proof was allowed by witnesses, of facts tending to shew that the order had been given.

[*Faculty Collection*, IV. 60; *Dictionary*, 12,403.]

PATRICK Spink was proprietor of certain tenements in the burgh of Aber-

brothock. On the 13th August 1761, being about to leave Scotland and settle in Jamaica, he granted a factory to Provost John Wallace, merchant in Aberbrothock, with special powers to sell the tenements aforesaid.

On the 1st April 1762, Wallace exposed the tenement to sale by way of public roup: One of the tenements was advertised to be put up to roup at the price of L.50 sterling. For it, Alexander Mudie, writer in Aberbrothock, offered L.65, and was preferred as the highest offerer. The price was made payable at Whitsunday 1762, the term of his entry. It had been conditioned, by the articles of roup, that Spink, the proprietor, should himself grant the disposition to the purchaser, and that Wallace should be bound to procure such disposition properly executed, between and a limited time. Wallace accordingly had the disposition made out in favour of Provost Ouchterlony, as if the purchase had been made for his behoof, and transmitted it to Spink, that he might execute it. But the ship, in which it was sent to Jamaica, having been lost on the voyage, the disposition never came into the hands of Spink. Wallace transmitted a second disposition, also in favour of Provost Ouchterlony; and it was, in January 1764, duly executed by Spink. Provost Ouchterlony, however, refused to have any concern in the bargain, to accept of the disposition, or to pay the price. Upon this, Wallace insisted, in an action before the Sheriff of Forfar, against Mudie, the purchaser, and against Ouchterlony, for whose behoof it was supposed that the tenement had been purchased. The libel, after reciting that the tenements had been exposed to sale by public roup, set forth, "That one of these tenements and yards was, by Alexander Mudie, writer in Aberbrothock, purchased for and on account of Alexander Ouchterlony, present Provost of Aberbrothock, at the sum of L.65 sterling: That, by the conditions of roup, the purchaser's entry was at Whitsunday 1762, and they had right to the rents after that term: That, accordingly, the said Alexander Ouchterlony took possession of the tenement purchased by Alexander Mudie for him,—uplifted the rents,—repaired and set the tenements to new tenants; but now absolutely refused to accept of the right to the said tenement and yard, and pay the price." The libel concluded for payment both against Mudie and Ouchterlony. Both the defenders were personally cited. Mudie made no defence; and, on the 29th March 1764, judgment was pronounced against him. Two procurators appeared for Ouchterlony: The defences bore, that he was no party in the roup; that his name is not mentioned as an offerer, nor did any person pretend to have had a commission from him for purchasing the tenement: "What Mr Mudie may say in this matter, as to a commission given him by Provost Ouchterlony to purchase the tenement for him at the roup, it is nothing to the pursuer; he may make the best he can of Mr Mudie; for the process is ineptly brought against Provost Ouchterlony, at this pursuer's instance." If Mr Mudie should think proper to bring an action against Provost Ouchterlony for his relief, as making the purchase by commission, that commission ought to be libelled on and produced; and even in that case Ouchterlony has very relevant defences to propound; such as that the conditions of roup were not strictly fulfilled on the part of Wallace." The defences then proceed to specify the particulars wherein Wallace had failed to fulfil the articles, and they conclude with an absolute denial that Ouchterlony had taken possession of the tenement, repaired it, or set it to new tenants. During the dependence of the action against Ouch-

terlony, Mudie insisted in an action before the Sheriff against Ouchterlony, concluding to be relieved of the purchase, and craving to be allowed a proof of the *res gesta*. This action was raised in April, but not called in court till June, on the very day on which Ouchterlony died. Mudie insisted before the Sheriff in a new action against the representatives of Ouchterlony. The representatives pleaded, that the supposed transaction could only be proved *scripto vel juramento*. On the 18th December 1764, and 25th January 1765, the Sheriff “found the proof, as craved by Mudie, not competent, and therefore assoilyied the defenders.” Mudie obtained advocacy, and, by appointment of the Lord Auchinleck, Ordinary, lodged a condescendence of the facts which he offered to prove. This condescendence bore, in substance, That Ouchterlony, immediately after the roup was over, acknowledged to third parties that the tenement was purchased for him,—mentioned a token which he had given to Mudie how to proceed in bidding; and also spoke of the use which he proposed to make of the tenement: That, at Martinmas 1762, he took payment of the rents from the tenants: That he employed workmen to make repairs upon the stone-work of the house, caused a carpenter to make a new roof to it, and a slater prepare 22 bolls lime for the repairs: That he let the house to two tenants, to be entered to at Whitsunday 1763: That they entered accordingly, possessed it, and paid rent to Ouchterlony during his life, and continue still to possess: and that Ouchterlony offered L.5 sterling to John Miln, to be freed of the purchase.

The defenders ANSWERED,—That the articles of the condescendence were either not relevant, or not probable by witnesses. Mudie endeavoured, by a diligence, to recover receipts for rents granted by Ouchterlony, but without success; so that the question fell to be determined upon the relevancy of the proof sought and its competency by witnesses.

On the 24th January 1766, “The Lord Ordinary,—having considered the report of the act and commission, with the condescendence and answers, and other proceedings in this cause, and specially that the purchase was made by the pursuer upon the 1st of April 1762, and that the pursuer did not commence his action, or even take out his libel, till the 4th day of July 1764, when Provost Ouchterlony was dead,—finds, That the allegation set forth by the pursuer, which he offers to prove by witnesses, now that he has failed in recovering the written documents founded upon by him, cannot be allowed to go to proof by witnesses; and assoilyies the defenders, and decerns.”

Upon advising a representation for the pursuer, the Lord Ordinary, on the 4th February 1766, pronounced the following interlocutor:—“Having considered this representation, finds the circumstances in this case offered to be proved, though strong, are not sufficient, in law, to subject the defenders; and as there is not sufficient set furth to vary the Lord Ordinary’s interlocutor, except in so far as concerns the time when the process was brought, which appears now to have been in April 1764, when Provost Ouchterlony was alive, which does not appear to be of great weight, adheres to the former interlocutor, and refuses the desire of this representation.”

The pursuer reclaimed. Answers were put in to his petition.

ARGUMENT FOR THE PURSUER:—

In a question as to relevancy, what is offered to be proved, must be

held as proved. From the circumstances of the case, there is legal evidence that the purchase was made by mandate from Ouchterlony, or for his behoof. This appears from the conduct, 1st, of Wallace, who sold the subjects; 2d, Of the pursuer, who bought them; 3d, Of Ouchterlony, for whose behoof they were bought. *First*, As to the conduct of Wallace, who sold the subjects, he ceded possession to Ouchterlony: he made out first one disposition, and then another, in favour of Ouchterlony, to be executed by Spink the proprietor; he laid his action for performance against Ouchterlony as well as Mudie,—against the one as actual purchaser, against the other as the person for whose behoof the purchase was made. *Secondly*, As to the conduct of the pursuer; he never took nor demanded possession of the subjects, although the entry to the purchase was declared to be Whitsunday 1762. He suffered Ouchterlony to take possession of the subjects, and to use them at his pleasure. *Thirdly*, As to the conduct of Ouchterlony himself; he assumed possession, repaired the houses, levied the rents, removed tenants, and placed others in their room. From the moment of the public roup he was universally held to be the purchaser; repeatedly in conversation declared, that it was on his account that the pursuer made the purchase; and he even offered a valuable consideration in order to be relieved of the purchase. When pursued by Wallace for implement, he did not, by his two procurators, deny the fact, but pleaded defences implying an acknowledgment of the fact. This case does not fall within the statute 1696, which provides, “That no action or declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or backbond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, and his heirs or assignees, the declarator shall be intended; or unless the same be referred to the oaths of parties *simpliciter*.” For it will be observed, that, in this case, if there were any trust, the pursuer, Mudie, and not Ouchterlony, was the trustee; and thus, from the words of the statute, it might be pleaded, that Ouchterlony could not have proved the trust against Mudie, otherwise than *scripto vel juramento*; but it does not follow that Mudie could not have proved the mandate against Ouchterlony otherwise than *scripto vel juramento*. The Court has allowed witnesses to be received for proving a mandate to purchase lands. This was allowed in the late cases, *Tweedie against Loch*, and *Colonel Skene against Balfour of Balbirnie*; and still more recently in the case, *Maxwell of Leckiebank against Mrs Rigg*.

ARGUMENT FOR THE DEFENDERS :—

Ouchterlony was no bidder at the roup; Mudie was, and became purchaser in his own name; and, therefore, unless he can prove, in a habile manner, that Ouchterlony gave him a commission, the representatives of Ouchterlony must be assoilied. Commissions like that which is here asserted to have been given, are generally given in writing. This proceeds from the general opinion of men, that such commissions are only probable by writing. And the reason of this opinion is obvious: verbal commissions may be easily misunderstood by witnesses; and the Court expressly found, “16th June 1688, *Laing against Vanse*, That a command, mandate, or order, is not relevant to be proven unless *scripto vel juramento*.” When one party holds a right in

trust for another, there is a species of the contract *mandati*. Formerly, a proof of such trust, by facts and circumstances, was admitted; but the statute 1696 corrected this deviation from the general rule, a deviation particularly dangerous in matters of land-rights. Neither could the statute 1696 mean to give a greater privilege to the trustee than to the truster. If only writ or oath can prove against the one, only writ or oath can prove against the other. With respect to the cases quoted, in them the question was with the persons alleged to be trustees, who denied the trust, in prejudice of their supposed employers: And, in Loch's case, the supposed mandatory expressly consented to the proof by witnesses. Further, the facts condescended on are in themselves irrelevant. They consist of allegations as to words uttered *ex post facto*, which witnesses may have misunderstood. Had rents been received by Ouchterlony, the receipts granted to the tenants would have been recovered. The tenants themselves cannot be admitted to swear to their having paid rents within the years of prescription; for this would be to admit them to operate their own liberation by their own oaths, before the lapse of the prescription. As to Ouchterlony having repaired the subjects in controversy, and having granted leases; these things might have happened in consequence of a lease or of a commission from Mudie, concerning which the representatives of Ouchterlony can have no knowledge; and although Ouchterlony had offered a consideration to get free of the purchase, this would have implied no more than a desire, on his part, to avoid the trouble and the expense of a lawsuit with the pursuer.

"The Lords allowed the proof before answer, and remitted to the Lord Ordinary to proceed accordingly."

Act. A Lockhart. Alt. D. Rae.

OPINIONS.

PITFOUR. Things have been done by the parties; and *rei interventus* bars the *locus penitentiae*. No danger in allowing the proof, for there is already some real evidence.

GARDENSTON. Of the same opinion; on the authority of the cases, *Tweedie* and *Skene*, where the Court admitted witnesses to prove a mandate for purchasing land.

PRESIDENT. I would doubt of allowing such a proof by witnesses solely; but, in a question of this kind, written evidence may be supported by witnesses: here there is already some written evidence, namely, the defences made by Ouchterlony. As his procurators denied *in fact*, they must be held to have corresponded with Ouchterlony, and their assertions will be held as his assertions.

1766: June 13. POOR JANET ANDERSON, resider in Edinburgh, *against* ALEXANDER DONALDSON, Bookseller in Edinburgh, and OTHERS.

Provision to a daughter payable Year and Day after her Marriage.

[*Faculty Collection, IV. 258 ; Dictionary, 12,972.*]

On the 26th February 1699, Mr Thomas Anderson, burgess of Edinburgh, became bound, by his marriage-contract, "in case there should happen to be but one daughter procreated by the said marriage, to pay to her the sum of 18,000 merks; and if there should be two, to them the sum of 20,000 merks; and if there should be three, to them the sum of 30,000 merks, whereof 12,000 merks to the eldest, 10,000 merks to the second, and 8000 merks to the youngest; and that within year and day after their respective marriages." Of this marriage there were issue four daughters. Elizabeth, the second, was married to William Coutts. On the 27th March 1725, Janet, the fourth daughter, was married to Robert Nicol. The three elder sisters deduced adjudications or certain tenements in Edinburgh, belonging to their father, in order to operate payment of their shares of the 30,000 merks contained in the marriage-contract. More particularly, on the 19th January 1726, Elizabeth, the second daughter, deduced an adjudication for 10,000 merks, as her share of the 30,000 merks. In 1727, Janet, the fourth daughter, insisted in an action against her father and her three sisters, concluding for a share of the 30,000 merks, upon the medium of the presumed intention of parties, that, in the event of the existence of four daughters, the fourth was not to be left destitute, while the others were provided.

On the 31st July 1729,—“The Lords found, That the fourth daughter is entitled to a proportion of the 30,000 merks, in the case which has happened, of the existence of four daughters; and found her proportion, suitable to the provision made in the contract of marriage, is 4500 merks, so as to restrict the provision of the eldest daughter to 10,500 merks; the provision of the second to 8,500 merks; and the provision of the third daughter to 6500 merks:” (that is, the Court took the sum of 1500 merks from each of the provisions, and gave it to Janet, the fourth daughter.) The Court further declared,—“That no decree for the said 30,000 merks, as being the provision decerned to be paid to the three sisters proportionally, ought to extinguish the portion of the said Janet, or be anywise hurtful or prejudicial to her, the fourth daughter, of her foresaid proportion thereof; and, accordingly, farther decerned and ordained the said three other daughters to repeat and pay back to the said Janet, and her husband for his interest, such sums of money as have been intromitted with by them of their father's means and estate, in prejudice of the said Janet's free share and proportion, as aforesaid.” Interest also was decreed to Janet Anderson from the time mentioned in the marriage-contract, that is, year and day after marriage, or from the 28th March 1726, being upwards of three years preceding the date of the interlocutor. At the date of this interlocutor Geddes of Scotston had right, by assignation, to the provision of one of the daughters, and, of consequence, was a party to the judgment. On the 16th December

*This judgment was
13 March 1734.
C. P. H. G. G.*

1729, Elizabeth, the second daughter, and William Coutts, her husband, conveyed to Geddes of Scotston the adjudication for 10,000 merks, which they had deduced in January 1726. The conveyance bore this clause,—“With the burden of L.1000 Scots, decerned to be paid to Janet Anderson, fourth daughter of the said Mr Thomas Anderson, and Robert Nicol, her husband, for his interest, out of the sum of 10,000 merks, conform to a decret of the Lords of Session, obtained against him for the same.” About this time, 1729, a process was raised for ranking the creditors, and for sale of the subjects of Thomas Anderson. In 1732 decret of ranking was pronounced. In the ranking, Scotston produced the adjudication which had been led by Elizabeth, the second daughter, and her conveyance to him: the clause burdening the conveyance with L.1000 Scots is *verbatim* recited in the decret of ranking. Upon this interest Scotston was preferred, *secundo loco*, for the principal sum and interest, with the burden of the said sum of L.1000 Scots, decerned to be paid out of the said William Coutts’s adjudication to Robert Nicol, &c. This L.1000 Scots is expressly excepted out of Scotston’s oath on the verity of his debt. The preferences of creditors having been adjusted, the subjects were exposed to sale by order of the court: On the 9th November 1734, they were purchased by Scotston. However, he paid no part of the price; his bond remained unretired in the hands of the clerk of process. Soon after, Scotston sold the tenements to different persons: those purchasers made up feudal titles to the tenements, and again disposed them to others. Janet, the fourth daughter, as having right to the L.1000 Scots, upon Elizabeth’s adjudication, insisted in an action of mails and duties against the tenements aforesaid. Donaldson, and the other proprietors by progress from Scotston, appeared for their interest, and pleaded defences.

The Lord Pitfour, Ordinary, upon the 16th July 1765, “sustained the pursuer’s title, but allowed the defenders to produce a title to exclude.” Upon advising a representation and answers, together with the writings produced, the Lord Ordinary, upon the 29th January 1766, pronounced the following interlocutor:—“Finds, that the pursuer, Janet Anderson, in virtue of the decret of this court in 1729, is entitled to the sum of L.1000 Scots, as a part of the portion of 10,000 merks, provided to her sister Elizabeth by their father’s contract of marriage, for which Elizabeth had adjudged his estate in the year 1726: and that the pursuer is entitled; in virtue of said adjudication, to insist for a decret of mails and duties, against the said tenements, for such part of the accumulated sums contained in the adjudication as shall appear to arise from the said L.1000 Scots, and interest thereof adjudged for: and decerns in the mails and duties accordingly.”

The defenders reclaimed. Answers were put in to their petition.

ARGUMENT FOR THE DEFENDERS:—

The question resolves into this, Whether has the pursuer’s claim for L.1000 Scots such a real lien upon the lands as to affect the singular successors of Scotston, who was the purchaser at the judicial sale. Had the pursuer and her husband denuded Elizabeth and her husband of the adjudication, to the extent of L.1000, and obtained themselves ranked on it *proprio nomine*, such incumbrance would have remained a charge upon the estate, not only against the purchaser at a judicial sale, but against all others acquiring from him; for that

such purchaser can never be discharged but by payment of the debts ranked : those debts, until paid, retain their security in the ranking. But, here, it was Scotston who stood in the right of Elizabeth's adjudication, and who was accordingly ranked, with the burden, indeed, of paying L.1000 Scots to Nicol, the pursuer's husband ; and as Scotston stood in the right of the adjudication, he alone could receive payment, or discharge the adjudication. Had the adjudication for 10,000 merks remained with Elizabeth and her husband, and had Scotston paid the whole sum to them, it is certain that such payment would have effectually discharged the estate of that adjudication. As Scotston, who became purchaser at the sale, did at that time stand in the right of that adjudication, and was accordingly ranked for the whole 10,000 merks, it follows that the adjudication was as much extinguished in his person as it would have been if paid to Elizabeth and her husband. Scotston, by his purchase, came to have payment in his own hands, and this is equivalent to payment to a third party. The persons acquiring from Scotston cannot have their purchase burdened with a debt so extinguished. That rights acquired by putative heirs, or others *in titulo* for the time, do accresce to the true owners, is a principle which the defenders do not dispute. Hence, the pursuer and her husband might have compelled Elizabeth and her husband to denude of the adjudication to the extent of the L.1000, and they might have obtained themselves ranked for it ; but this they neglected to do : Satisfying themselves with the personal decerniture against Elizabeth and her husband, they suffered Scotston to be ranked for the whole 10,000 merks, with the burden of L.1000. There remained, then, a personal obligation against Scotston for payment of the L.1000, but no real burden on the lands. The purchasers from Scotston acquired upon the faith of the records, for onerous causes ; their rights were completed by charter and infestment. They cannot suffer by the neglect of the pursuer and her husband, who, instead of denuding Elizabeth and her husband, and thereby rendering the burden real, allowed the burden to remain personal, first against Elizabeth, and afterwards against Scotston.

Secondly, Supposing the L.1000 to be still a real incumbrance upon the subjects, still the pursuer is not entitled to the benefit which may thence arise. The adjudication, if subsisting at all, stands in the person of Scotston. The pursuer was married upon the 27th March 1725 ; the money in question was not payable till the 28th March 1726, *i. e.* year and day after her marriage : as there was no obligation for payment of annualrent, it was a subject purely moveable, and carried by the *jus mariti* of Nicol. Elizabeth's adjudication for the 10,000 merks, if it accresced, must have accresced to Nicol the husband, as in the right of the debt itself.

ARGUMENT FOR THE PURSUER :—

Elizabeth secured the 10,000 merks by leading adjudication in 1726 ; the pursuer was afterwards found entitled to L.1000 Scots of that sum ; the conveyance of the adjudication made to Scotston, and produced in the ranking, was burdened with that L.1000 Scots. By the decret of ranking, the adjudication was burdened with that sum. It was accordingly excepted out of Scotston's oath on the verity of his debt, and this oath is *verbatim* inserted in the decret of ranking. From all which the pursuer contended that the L.1000 still continues a real burden upon the subjects contained in the adjudication ; and,

of consequence, that her right therein is sufficient to entitle her to a decret of maills and duties. Her general plea will be illustrated by the consideration of the following particulars: The pursuer's claim for her provision took its rise from the marriage-contract of her father in 1699. The judgment of the court in 1729, proceeded upon the implied will of the father, in the event of the existence of a fourth daughter. The Court *declared* but did not *create* her right. Hence, the pursuer was found entitled to interest from the term of year and day after her marriage, that is, from a period preceding her action, and no less than a period of three years previous to the decree in her favour. Hence, also, there was no decret pronounced against her sisters personally; and, indeed, the judgment 1729 expressly found the pursuer entitled to a proportion of the 10,000 merks. This proposition being once established, the pursuer's right, *pro rata*, to the adjudication deduced by Elizabeth, is evident. In 1726, Elizabeth considered herself as entitled to the L.1000 Scots, as well as to the rest of the 10,000 merks. The adjudication which she then deduced, was from that time connected with the right, for security of which it was deduced; and it must of consequence devolve to the pursuer, who was afterwards found entitled to L.1000, as a proportion of the 10,000 merks; for it is an uncontroverted rule in law, that every security in a subject, taken by a putative proprietor, accretes to the real proprietor. But, independent of this, the conveyance of the adjudication from Elizabeth to Scotston was burdened with the L.1000; and this conveyance was produced by him as his title in the ranking: the preference of the adjudication in the ranking was expressly burdened with the L.1000. Hence the pursuer is, to the extent of L.1000, preferable to Scotston, and, of course, to those deriving right from him. The repeated mention of this burden made in the decret of ranking, with which Scotston's title was immediately connected, has this consequence, that they who purchased from Scotston, without regarding the burden, must be held to have acted either *mala fide*, or with supine and unpardonable negligence. That Scotston did himself obtain the decret of sale, will not vary the case. From the statute 1695, it is evident that, until the price is paid, a decret of sale does not purge the debts and diligences affecting the estate; and so it was determined by the Court, *24th July 1739, Creditors of Bonhard*. To the objections urged by the defenders, the following answers are made. *First* objection: "Although the pursuer and her husband might have denuded Elizabeth and her husband, yet they did not, so that here there is nothing except a personal claim against Elizabeth."

Answer to the *first* objection:—

1mo, If it be doubtful whether the right in the adjudication, *pro rata*, of L.1000, be in Elizabeth, or in the pursuer, this is *jus tertii* to Scotston and his successors: It matters not to them, whether the sum be paid to the second or to the fourth daughter of Thomas Anderson. *2do*, Supposing that the pursuer may plead in the right of Elizabeth, she contends that the adjudication to the extent of L.1000 is properly vested in her. There is no occasion for any form of legal diligence, in order to make a security, taken by a putative proprietor, accrete to the real proprietor. The law requires not superfluous diligence and fruitless expense. That such diligence is not necessary, appears from the very term *accrete*. Were a process required for denuding the leader of the se-

curity, before such security could be conjoined with the subject, and become vested in the proprietor of the subject, how could it be said to accresce? See *Stair*, 13th July 1664, *Earl of Lauderdale* against *Woolmet*; *Fountainhall*, 24th January 1696, *Earl of Cassilis* against *Montgomery*; and *Forbes*, 10th January 1712, *White* against *Reid*. In all those cases it was understood that the securities accresced without any necessity of denuding the persons who had led them. 3to, Had an assignation from Elizabeth to this adjudication been required, the judgment 1729 was virtually such. By it, the Court “provided—that no decree obtained by the three sisters for their shares of the 30,000 merks, should be in any degree hurtful or prejudicial to Janet Anderson.” When the Court added this proviso, it had the adjudications in its view; and, if it had not meant to give the pursuer a right to the diligences already deduced, as well as to the sum itself, it would have given her nothing: She could not render her claim to the sum effectual against her father, for he was a bankrupt: his subjects were affected with diligence, and a ranking of his creditors and sale of his estate depended; nor against her sisters, for, with respect to them, she had no personal claim of debt. 4to, It cannot be denied that the judgment 1729 is equivalent to a conveyance from Elizabeth of the L.1000 itself, without regard to the adjudication. Now, this is sufficient to carry the adjudication, *pro rata*, along with the sum conveyed. Thus, it was found, 28th February 1751, *Wilson* against *Burrel*,—“That an adjudication led on an heritable bond was carried by the disposition of the sums in the said heritable bond, albeit the said adjudication was not there specially conveyed.” 5to, Even supposing an express conveyance of the adjudication to have been necessary, and supposing the judgment, 1729, to be negative, and not an absolute conveyance, yet still the clause in Elizabeth’s conveyance to Scotston, burdened with the L.1000, must be considered as an absolute conveyance of the diligence, *pro rata*, of the L.1000, in favour of the pursuer. It matters not that the pursuer was no party to that conveyance; for, where one can receive advantage only from a transaction between third parties, his consent is presumed, unless he absolutely recede. See Dictionary, title *Jus quaesitum tertio*.

Second objection for the defenders:—

“The burdening clause in the conveyance by Elizabeth, and in the decret of ranking, did not create a real burden on the subject adjudged. Scotston was the creditor in the adjudication, and he alone was personally liable to the pursuers.” *Answers* to the second objection. If the pursuer’s former plea be good, this objection, although not contradicted, would avail nothing. A burden for an uncertain sum is not a real right, even when laid on an heritable right. This principle has been established for the security of the records, and of singular successors; but, when the conveyance of a right is burdened with a certain sum, there such burden affects every singular successor to the subject; and no one, of the least prudence or attention to his affairs, can ever suffer any prejudice from the establishment of such a principle. See *Gosford*, 20th February 1673, *Morison* against the *Creditors of Darsie*; *Fountainhall*, 14th December 1698, *Countess of Rothes* against *French*; 10th January 1738, *Creditors of Smith* against *Smiths*; and 17th November 1757, *Isobel Gordon* against *Katharine Ross*, where lands, being disposed by a father to his son, with the burden of paying a certain sum to his grand-daughter, “the sum was found a real burden

upon the lands in a competition with the son's creditors." The circumstance of this burden being repeatedly mentioned in the decret of ranking, deprives the pursuers of all pretence of *bona fides*; for, upon that decret, the title of their author depended. The defender's argument proceeds upon this mistake, —that Scotston alone stood in right of the whole adjudication, and was in a capacity to have granted a discharge thereof; whereas in truth his right was limited to 8500 merks of the sum for which the adjudication was deduced. The pursuers stood in the right of the remaining part of the sum, and her discharge would have been sufficient to the purchaser at the sale. Had a scheme of division been made out, the L.1000 would have been thereby declared payable to the pursuer, not to Scotston.

Third OBJECTION by the defenders :—

"Supposing the L.1000 to be still a real burden upon the subject, yet it fell under the *jus mariti* of her husband." ANSWER to the third objection. The defenders confound this case with that of a moveable bond granted to a wife and her representatives, upon which an heritable security was led after the marriage: but, in truth, the pursuer's ground of claim is different in its nature. The portion provided to her was indeed a conditional provision. Had she died within year and day of her marriage, neither she nor her husband would have had any claim to it. It was not a debt which existed at the marriage and upon which an heritable security was afterwards led. At the time of the marriage it was a conditional claim.—That condition was purified by her living year and day after the marriage; so that, for a twelvemonth after the marriage, her right had no existence. Before her right existed, the adjudication was deduced, and the debt thereby rendered heritable: and thus the pursuer's claim was at no time moveable. When the adjudication was deduced, the L.1000 belonged to Elizabeth, and would have continued to belong to her, had not the pursuer survived the year and day. Thus the question is not whether a debt, moveable at the time of marriage, is withdrawn from under the *jus mariti* by a supervening adjudication; but whether a claim, upon which an adjudication has been led, and which afterwards opens to the wife during the marriage, does fall under the *jus mariti*, although rendered heritable before it belonged to the wife? And the pursuer apprehends that it does not. Not even the annualrents of this claim fall under the *jus mariti*; for it was solemnly decided, 3d February 1788, *Ramsay against the Creditors of Clapperton*, "that all the sums contained in an adjudication, principal, annualrents, and *accessaries*, are heritable not moveable." The reason is, that an adjudication is of the nature of a proper sale, where the land comes in place of the debt.

"The Lords adhered to the interlocutor of the Lord Ordinary."

Act. J. Fergusson. *Alt.* A. Lockhart.

OPINIONS.

AUCHINLECK. The first question, How far Scotston, being in right of Elizabeth's adjudication, did, by purchasing the subjects, sopite the debt, and leave no more than a personal claim to Janet Anderson :—Although Elizabeth deduced an adjudication for 10,000 merks, yet she was found to have no title to more than her share of that sum, that is, to 10,000 merks, minus L.1000 Scots. Scots-

ton had a conveyance to no more than Elizabeth's share. Janet's share accresced to herself, nor did she need a conveyance: Although the debt had been conveyed to Scotston, even as to Janet's share, still Scotston's purchase would not have sopited the debt. Here, Elizabeth, as a putative claimant, adjudged for too much, and that *too much* accresced to Janet.

KAIMES. I doubt as to the explanation of the interlocutor 1729, which is offered by Janet Anderson. When Elizabeth deduced her adjudication, her right was good, to the full extent of 10,000 merks: afterwards, *ex equitate*, Janet was allowed a share therein. The Court did not find that the adjudication was to be conveyed from each sister to Janet, *pro rata*, of L.1000: the Court only made Janet a creditor to her sisters respectively in that sum.

ELLIOCK. Although the interlocutor of the Court does not find Elizabeth bound to convey, yet it finds Janet to have a right in the sum, which is virtually the same thing.

PITFOUR. Here there was a trust in Elizabeth for the behoof of Janet, not so much *ex equitate* as *ex praesumpta voluntate testatoris*. The diligence of the trustee must accresce. Elizabeth was more than a putative claimant; she was the real proprietor, and would have so continued, had not Janet survived a twelvemonth after marriage.

KENNET. The conveyance to Scotston is *with the burden*, and he is so ranked.

PRESIDENT. The interlocutor 1729 found the 30,000 merks left to *four* daughters, not to *three*. Whether that judgment was right or wrong is not the question. The question is as to the explanation of an interlocutor which is now final and irreversible. Janet was a creditor to her father, not to her sisters: One of her sisters, Elizabeth, adjudged: This adjudication accresced *pro tanto* to Janet. Elizabeth did not convey her adjudication simply, but only her share in the adjudication; Scotston, by this conveyance, became the trustee of Janet: the decret of ranking preferred Scotston, with the burden of payment to Janet. Here there was no purchase from Scotston upon the faith of the records: The burden appeared *ex facie* of the right; the bond granted by Scotston for the price remains unretired; there is not so much as a *bona fides* in the purchasers from Scotston.

AUCHINLECK. As to the *second* question, the *jus mariti* of Nicol,—the sum found to belong to Janet was due year and day after the marriage; and by that time the debt had become heritable by adjudication, and excluded the *jus mariti*.

PITFOUR. Whenever there is a condition depending upon a certain time, the obligation is not due till that time come. Dictionary, title *Implied Condition*.

PRESIDENT. When there is a condition which may exist or may not, until the term of payment no *jus crediti*.

1766. June 13. WALLACE and COMPANY, Linen Manufacturers at Aberbrothock, *against* PATRICK MILLAR, Merchant in Edinburgh, and Others, Creditors of John Weir.

LOCUS PŒNITENTIÆ.

When it is *pars contractus* that a bargain shall be reduced into writing, there is *locus pœnitentiæ* till that be done.

[*Faculty Collection, IV. 256. Dict. 8475.*]

IN 1763, Millar, Gibson, and Balfour, merchants in Edinburgh, entered into a contract of copartnery with John Weir, for carrying on the linen trade. By this contract, Weir was constituted acting manager: the firm of the company was *John Weir and Company*. John Weir and Company became concerned with Thomas Smith in a bleaching-field, at Ford, in Mid Lothian. At this bleaching-field it was proposed to bleach the linen of other manufacturers, as well as the linen of John Weir and Company. On the 29th March 1765, Wallace and Company, manufacturers at Aberbrothock, wrote to John Weir and Company, offering to send a considerable quantity of linen to bleach at Ford. On the first of April, John Weir and Company made an answer acknowledging the favour. By subsequent letters, the price to be exacted for bleaching was adjusted. In the beginning of May, Wallace and Company forwarded to John Weir and Company, five bales of green linen, containing 8183 stamped yards. On the 7th May, J. Weir and Company acknowledged the receipt of those linens, and desired that the remainder might be forwarded. On the 13th May, Wallace and Company acknowledged the receipt of the letter 7th May, and mentioned that they had sent the remainder of the linen in two bales, amounting to 32,262 yards; and they made an offer to the company of the whole linen at a certain price, payable in two or three months. On the 16th May, Weir returned an answer in his own name: He therein said, "You will please know that this is the last year of the contract of John Weir and Company, who are purchasing no more goods, but are selling off their stock, in order to bring their affairs to a period. As I am, however, to carry on the linen trade in my own name, as I did formerly, I shall take your offer, upon giving me four months' credit at the prices you fix, and shall give my acceptance, payable at that time, which shall be regularly retired when due." On the 17th May, Wallace and Company wrote an answer, resuming Weir's offer, and adding, "which we hereby condescend to. You may compute their amount and send us your acceptance, payable in four months, discounting two per cent." They add, "We have made out invoice of the linens on the other side, amounting to L.426 : 18 : 11, for which, if found without error, you may transmit us your acceptance." On the 23d May, Millar, Gibson, and Balfour, having reason to suspect Weir's circumstances, protested two bills of his, and pursued him for relief of a credit which they had given him. They also used arrestments in the hands of several persons possessed of his effects. On the 24th May, a meeting of Weir's creditors was called, and, upon the creditors agreeing to

follow joint measures, Millar, Gibson, and Balfour, gave up their preference. On the same 24th May Weir wrote to Wallace and Company, informing them that he had stopt payment. He said, "In this situation, I thought it would have been both unjust and dishonest to have accepted of your offers, although attended with the most favourable circumstances, and therefore decline having any concern with your goods. The first parcel is all cut and marked, and just going to be laid down upon the green. They shall be forwarded as soon as possible; and when convenient you may advise if you would have any of the broad kind put up in the broad way." On the 27th May, (Monday,) as soon as possible after the receipt of Weir's letter, Wallace and Company returned an answer, resuming Weir's letter, and adding, "As the linens are to be bleached and finished on our account, we believe it may not be amiss to make up part of them in the broad way." On the 1st June, Weir executed a disposition of his effects to Millar, as trustee for the behoof of his creditors. The linens were poided for the behoof of Weir's creditors. Wallace and Company insisted in an action against Millar, Gibson, and Balfour, and also against Smith, as partners in the bleaching-field at Ford. They set forth, that the company had agreed to bleach the linens, and had acknowledged the receipt of them. They concluded for delivery of the linen properly whitened, or for payment of the value, with damages: and they separately concluded against John Weir to the same effect. In defence against this action, it was pleaded for the proprietors of the bleaching-fields, that they could not be liable either for restitution of the linen, or for payment of its value, for that it had been poided by the creditors of Weir as his property. It was separately pleaded by Millar, as trustee for the creditors of Weir, that the sale of the linen to him was completed by the pursuer's letter of the 17th May 1765, and the property thereby transferred to him: That he could not, after stopping payment, and suffering diligence to go out against him, either re-deliver the goods, or resolve the sale, to the prejudice of his other creditors. On the 17th December 1765, the Lord Kennet, Ordinary, pronounced the following interlocutor: "In respect it appears that the sale of the cloth with Weir was never completed, repels the defences proponed for the defenders, and decerns them to deliver to the pursuers the above linen cloth, amounting to 11,409½ yards, properly whitened and dressed, in terms of the libel; the pursuers, on receiving the same, paying to the defenders for whitening the said cloth, at the rate of one penny sterling per yard; or otherwise to pay to the pursuers the value of the said cloth, as libelled; and finds the pursuers entitled to expenses, and allows them to give in an account thereof."

On the 3d February 1766, upon advising a representation with answers, the Lord Ordinary "adhered, but found no expenses due."

The defenders reclaimed, and answers were put in to their petition.

ARGUMENT FOR THE DEFENDERS:—

For completing a bargain of sale, two things are required,—*first*, the consent of parties, as to the subject to be sold and the price to be paid. *Secondly*, Delivery of the subject to the purchaser. In the present case those requisites concur. Weir, by his letter of the 16th May, offered to purchase the linen at a certain price, payable in four months: the pursuers, by their letter of the 17th May, agreed to sell at that price, and upon that credit." Here, then, was the consent of parties as to the subject and the price. The delivery to Weir is also proved: of the first parcel, by his letter 7th May; of the second, by his letter

16th May. Thus, when the terms of the purchase were adjusted, he had the linen in his custody. It is true that the linen was originally put into his hands to be whitened on account of the pursuers: but this will not vary the case; for it will not be said that, in order to complete the sale, Weir ought to have delivered back the linen to the pursuers, and they to have re-delivered it to him. It is true that the pursuers desired Weir to send his acceptance of a bill for the value; but the sending this acceptance was no condition of the sale. The pursuers trusted to Weir's security for payment of the price: His sending or not sending an acceptance was of no moment; for it will not be pretended that a bargain of sale cannot be completed until the seller obtain an obligation in writing for the price: besides, this proposal of sending an acceptance was made by Weir, not originally required by the pursuers. It may be a hardship on the pursuers thus to lose part of the price of their goods, by becoming creditors to Weir; but, in transactions with a person circumstanced as Weir was, such hardships are unavoidable. As, by the bargain and delivery, the goods became the property of Weir, they are affectable by his creditors, and it matters not to them when he made the purchase, or whether he paid the price or no. A similar question was lately decided. *Barclay of Almerycross* commissioned some iron from Sweden: he agreed to sell part of it to *Arnot*. Arnot used to manage the affairs of *Barclay*, and the whole cargo of iron was at that time in the custody of Arnot. When this contract was entered into, the circumstances of Arnot were desperate; he soon after stopt payment and left Scotland. Barclay claimed the iron as his property, and he proved that Arnot, before the time of the bargain, knew himself to be insolvent, and had mentioned to different persons his intention of stopping payment; and yet the creditors of Arnot prevailed in a competition with Barclay, and the iron was found to have been transferred to their debtor. Weir was rendered a retour bankrupt in terms of law, within 60 days after his letter of 24th May, whereby he departed from his bargain; and, therefore, he could not give a preference to the pursuers in prejudice of his other creditors. It is the same thing in law, whether this preference was sought to be established in the form of a conveyance of subjects that had been long his property, or in the form of a letter passing from a finished bargain of sale.

ARGUMENT FOR THE PURSUERS:—

Here there was no completed bargain of sale: The offer which Weir made, and which the pursuers accepted, was that of purchasing the linen at a certain term upon an acceptance in writing. Bargains of this kind may be completed without writing; but,—when the agreement is, that the bargain shall be completed by writing,—until the writing be granted there is no complete bargain. Weir, in this case, was so far from granting an acceptance, that he declined the bargain altogether: Conscious that his acceptance could not be retired, he would not undertake what his circumstances rendered it impossible to perform. It is unreasonable to suppose that the pursuers, by their letter of the 17th May, meant, *ipso facto*, to divest themselves of the property, without being possessed of a proper document for showing that the price of the goods belonged to them: if so, then the property remained with them until such document was transmitted; and, as no such document was transmitted, the property is still in them. But, supposing that the letter of the 17th May was intended to

transfer the property, still something remained to be done for completing the bargain, *viz.* delivery of the goods. *Traditionibus, non pactis, dominia rerum transferuntur*, is as much a principle of the law of Scotland as of the civil law. The linen had been delivered to the company, not to Weir; and, from their books, it appears that the property was therein said to be in the pursuers. So the possession stood on the 17th May; it was therefore incumbent on Weir to take possession in his own name, not by delivering the goods back to the pursuers, and by receiving them a second time from the pursuers, but by taking possession of the one parcel in the warehouse, and of the other on the bleaching-field of his company. Instead of doing this, Weir, by his letter of the 24th May, disclaimed the bargain altogether. But, supposing the property to have been intended to be transferred, and actually to have been transferred, still it was lawful in Weir to disclaim the bargain. Weir could not have received the letter of the 17th May until the 18th or 19th,—diligence was raised against him on the 23d,—a meeting of his creditors was called on the 24th: it was an act of justice and good conscience in him to give up a bargain made so recently before his bankruptcy: it would have been unjust, and against good conscience, for him to have adhered to a bargain which he could not perform, and thereby have divided the goods of the pursuers among his creditors. The decision in the question between *Barclay of Almerycross and the Creditors of Arnot* is not in point; for there the purchase of the iron was made by Arnot in the beginning of April 1760, and yet he did not stop payment till the 14th May 1760. The iron was originally delivered to Arnot, and had remained for some time in his possession, as his property. The bargain, payable at six months' credit, was so entered in Arnot's books; and it appeared, upon proof, that, although Arnot proved insolvent, he continued to transact business in his ordinary manner, after the bargain was concluded.

"The Lords adhered."

Act. D. Græme. *Alt.* A. Wight.

OPINIONS.

The Court was unanimously of opinion, that Weir was not precluded from giving up the bargain, and that, in giving it up, he behaved like an honest man.

1766. June 17. CHARLES and ROBERT FALLS, Merchants in Dunbar, *against* ALEXANDER PORTERFIELD of FULLARTON, Merchant in Glasgow.

What Negotiation required in Bills payable at sight.

[*Faculty Collection*, IV. 374; *Dictionary*, 1593.]

In spring 1764, Mr Porterfield imported ten pipes of Madeira wine from

Carolina to Dunbar, on board the ship the Black Prince, belonging to Messrs Falls. On the 31st March 1764, Porterfield wrote to Falls, acquainting them that the wines "were recommended to their care, for entry and paying the duty:" He desired them to pay the duty and other expenses,—to take particular care of the management of the wines, and, if ready sale was not found at Dunbar, to send them up to Leith. On the 2d April Falls wrote, in answer to Porterfield, that the ship arrived on the 1st April, and that they had landed the Madeira: they added, "You will please let us know to whom we shall apply at Edinburgh for payment of the freight, duty, and charges: we will send you a note of the same in a few posts. We fancy it will be your best way to order it to Leith, where it will be at hand for sale." On the 9th April, Porterfield wrote in answer to Falls, "When I get your note of the exact sum, shall send you a draught on Edinburgh or Leith." He ordered them to fill up nine of the pipes out of the tenth; to send the wines to Messrs Bell and Rainie at Leith, and to acquaint them what was the exact quantity used in filling the pipes up, and also how many gallons, English, the tenth pipe wanted. On the 23d April, Porterfield repeated those directions, and added, "If, in place of a draught on Edinburgh, you chuse a bill on London, at the current exchange, which now runs high, let me know so much, and you shall have it." On the 24th April, in answer to the letter of the 9th April, Falls wrote that they had filled up the Madeira,—mentioned the contents of the ullage hogshead, and said that they would ship the wines by the first vessel for Leith: they added, "In the mean time, we send you an account of duty, freight, and charges, amounting to £129: 1s. sterling, for which you will send us in course an order on Edinburgh, as you know the duties are monied down." In this account they stated no commission, nor any consideration for factor-fee or for the advance of money. On the 3d May Porterfield wrote, in answer to the letter of the 24th April, that he had inclosed his indorsement to Thomas Johnstone's bill, on William Borthwick in Edinburgh, at three days' sight, for the £129: 1s. sterling. On the 7th May, Falls wrote in answer, "We have your favour, the 3d current, with Thomas Johnstone's bill on William Borthwick, at three days' sight, for duty and charges on your wine: when paid, will be noticed accordingly." Falls immediately sent the bill to Borthwick to be accepted and returned by him. On the 11th May, Anthony Ferguson, Borthwick's clerk, wrote to Falls, acknowledging the receipt of the bill: he added, "Mr Borthwick is out of town, but is soon expected home, when I shall present the draught, and doubt not but Mr Borthwick will honour the same, and will write you himself next post." Falls heard nothing of Borthwick for a fortnight. On the 26th May, they sent one of their clerks from Dunbar to Edinburgh; the clerk required Borthwick either to accept or return the bill: Borthwick desired that the bill might be left with him till the beginning of the following week, when, he said, he would either accept it or return it to Dunbar with a protest against himself for not-acceptance: to this proposal the clerk agreed. No account having come from Borthwick, on the 5th June Falls again sent their clerk to Edinburgh, and wrote to Borthwick, that they had ordered their clerk peremptorily to demand payment, or otherwise to get back the bill and protest. Upon this Borthwick delivered up the bill with a

protest, dated 31st May, taken against himself for not-acceptance, and against the drawer and indorser for recourse. On the 6th June, the clerk took a new protest on the bill, not only against the drawer and indorser, but also against Borthwick, for not-acceptance, for not-payment, and for damages and expenses which might arise from his not having negotiated the bill regularly; "in respect that the bill had been sent to him in due time for acceptance, but that he had kept it up for some time, without either accepting it or returning it with a protestation for not-acceptance." On the 7th June Falls wrote to Porterfield, acquainting him with what had happened, inclosing the bill with the two protests, and desiring to be reimbursed of their money, as the draught had not been answered. On the 14th June Porterfield signified to Falls his surprise at their conduct; mentioned that Johnstone had failed on the 5th June; that they could not but know they had lost their recourse against him, Porterfield, "but that, if any doubt remained with them, he could leave it to any two bankers of repute, versant in exchange." Falls registered their protest, and charged Porterfield with horning. He suspended; and the Lord Coalston, Ordinary, took the question to report.

ARGUMENT for the suspender:—

The laws and the practice of all mercantile nations require exact diligence in the negotiation of bills, in securities, which are the vehicles of trade, and indeed considered as ready money: Nothing can be more reasonable than the requiring such exact diligence: were it not for this, numberless inconveniences and inextricable confusion would arise in the mercantile world. Bills ought to be protested without delay for acceptance, and, when due, for payment: Protesting them, and notifying their dishonour, are steps of diligence essentially requisite. When, by accident, the holder is retarded or prevented from using such diligence, he is not to blame, and therefore he loses not his recourse; but when his delay is owing to his own negligence, or his own fault, he must answer for the consequences; he loses his recourse. The whole conduct of the chargers displays the most supine negligence: their intrusting the bill to Borthwick either to accept or protest; their leaving it in his hands from the 8th to the 26th May, without inquiring what had become of it,—their indulging Borthwick in a farther time to deliberate,—their neglect to inquire, after that time, whether he had accepted or not,—their not taking any protest till the 7th June, after the drawer had failed, and, during all this period of a month, never giving the suspender any notice of what was passing: all these circumstances exhibit a scene of unexampled carelessness in men of business. So sensible did the chargers seem of their own negligence, that, by their protest against Borthwick, they charge him with irregular and undue negotiation: and this is a direct admission, on their part, that the negotiation was irregular and undue. If Borthwick was guilty of a breach of trust in not protesting the bill more timeously, he must be actionable to the chargers who employed him, not to the suspender, who employed him not. Whether bills, payable at a day certain, do require a more exact diligence by the custom of merchants, than bills payable at so many days after sight, is unnecessary to inquire in the present case; for it cannot be pretended that the bills payable at so many days after sight are exempted from the common rules of negotiation. After a

bill at so many days' sight is presented, the term of payment is as exactly ascertained as if it had originally borne payment at a certain time. After such presenting, therefore, the same negotiation is required in the one case as in the other, and no custom or precedent has made a distinction. Neither will it vary the case, that here the bill was not indorsed for value instantly received, but, according to the chargers' plea, indorsed in security of a prior debt, for which, when paid, the suspender was to have credit, in consequence of which they were not bound either to present for acceptance, or to protest it, as was determined, *9th January 1758, Alexander against Cumming*; for, *1mo*, This notion of the bill being only in security is inconsistent with the charger's own demand of an immediate remittance to Edinburgh, with which the suspender instantly complied. The remittance of a bill, apparently good, and payable upon so short a notice as three days, could not be meant by the one party or accepted by the other as a security. This is very different from the case of *Alexander against Cumming*: There, the *species facti* was this; Robert Cumming being debtor to the Ropery-company in an account current, the account was settled, and a balance of £119 struck against Cumming. For security of this debt, he indorsed to the company certain bills, particularly one due by his brother James Cumming, payable at a distant day. By the docket of this account, it was declared, that those bills, when paid, should be in full of the account. The bill accepted by James Cumming was dishonoured, and the question arose, whether an indorsation in security obliged the indorsee to do exact diligence on the bill; and it is acknowledged, that, in a case so circumstanced, the Court found it did not: but, in a later question, more similar to the present one, the Court pronounced a different judgment. The case was this: Grosset transmitted to Murray, receiver-general of the customs, a bill upon James Drummond, in payment, *pro tanto*, of the balance Grosset was due upon his collections. The receiver-general, or his deputy, acknowledged the receipt of this bill, to be allowed to Grosset's credit when paid. No protest was taken for the dishonour of this bill, till a considerable time after it had become due, and, in the interim, Drummond proved a bankrupt. Upon this state of the case, Grosset contended that he ought to have credit for the contents of the bill, and that, in respect of the undue negotiation, no recourse was competent against him. On the other hand, it was contended for the receiver-general, That here there was no more than a pledge in security of a prior debt, to be credited when paid, and that an assignee in security was not bound in diligence. The Court of Session sustained the defence in February 1762; but the House of Peers, in March 1763, reversed this judgment, and found the receiver-general liable in the contents of the bill. The present defence is stronger than that moved for Grosset, and sustained in the last resort; for, from the whole strain of the correspondence between Falls and Porterfield, it appears that the bill in controversy was not deposited with the chargers as a security for a prior debt, but indorsed as an immediate remittance for the instant payment of money advanced; and that the loss was occasioned by the negligence of the chargers, by what they themselves, in their protest against Borthwick, term irregular negotiation.

ARGUMENT FOR THE CHARGERS :—

The chargers propose to prove, *1mo*, That here there has been no such omission of due negotiation as could, upon the footing of the bill alone, deprive the creditor of his recourse on the drawer and the indorser. *2do*, That, supposing recourse did not strictly lie upon the bill, yet, that the chargers' having gratuitously executed the suspender's mandate, and advanced their money for him, he stood bound to repay them, without their being put to any trouble, or incurring any hazard. *3tio*, That as the bill was taken by the chargers only in security, or to be credited when paid, the suspender cannot liberate himself from his obligation of debt, under the pretence of failure in negotiation of the bill.

1mo, "That here there has been no such omission of due negotiation, as could, upon the footing of the bill alone, deprive the creditor of his recourse on the drawer and indorser."

Bills were originally drawn payable at a day certain: In such case the drawer and indorser had reason to expect payment at that precise day: if it was not so paid, reason required that the indorsee should take a protest, and give due notification, to the drawer or indorser, that they might immediately take the proper measures for operating their own relief. But bills are sometimes intended, not merely for the benefit of the drawer or indorser, but also for the benefit of the indorsee; such indorsee may be uncertain at what time he can conveniently demand acceptance or payment, or when he will have occasion for the money: He may moreover be unwilling to incur the hazard of exact negotiation. To secure the creditor in all these respects, bills on sight have, by later practice, been introduced.—Forbes, *Treatise of Bills*, p. 57. That author observes, "That though such bills cannot be kept up indefinitely, but must, in a convenient time, be presented, in order to acceptance, it is hard to determine this convenient time, which may be longer or shorter according to accidents or circumstances."

Bills payable on sight, or on days after sight, are, in effect, letters of credit, which the *porteur* may use sooner or later, according to his conveniency. Hence the Court found,—“That bills drawn on sight did not require the same rigorous negotiation with bills payable on a day certain.”—*7th February 1735*. The same point was in like manner determined, *21st November 1759*, *William Andrew* against *Andrew Syme*.—Collection of Decisions by the Faculty of Advocates. There, a bill drawn on the 5th May 1755, upon the Dunlops of Rotterdam, and payable at twenty-one days' sight, was not presented for acceptance until the 20th June, whereby it became payable on the 11th July, whereas, had it been transmitted for acceptance by the post, it might have been accepted on the 5th May, and become payable on the 15th June. During the interval between the 15th June and 11th July the Dunlops became bankrupts; yet the Court thought that the *porteur* had not exceeded his discretionary powers of presenting for acceptance; and, therefore, in an action against the drawer, “repelled the defence that the bill was not duly presented for acceptance.” The suspender here endeavours to make a distinction between the negotiation required on bills at sight *before* and *after* presenting. And he pleads that—whatever may be the case of bills at sight before presenting, yet that, after presenting, the same negotiation is required in them as in bills payable on a certain day. For this distinction the chargers

can discover no reason nor precedent. It is contradictory to suppose that the *porteur* puts himself in a more unfavourable condition, by taking one step of diligence, that of presenting the bill, than if he had taken no step of diligence at all: If he could not forfeit his recourse by not presenting it, he cannot forfeit his recourse by presenting it sooner than required, without insisting for immediate payment or acceptance. Inchoate diligence can never have stronger consequences than no diligence, as to the *porteur*. But farther, in the case of bills of every kind, the question, as to due or an undue negotiation, depends upon circumstances; and whenever exact negotiation is prevented by accident, the creditor will not be forfeited of his recourse.—Forbes, Treatise on Bills, p. 95. In this case, the chargers transmitted the bill to Borthwick immediately upon their receiving it: it was owing to the accident of his absence from Edinburgh, and of their residence at a distance, that a final answer from Borthwick was not more early obtained. By sending the bill to Borthwick, they did no more than what a *porteur* commonly does, when he resides in a different place from the person on whom the bill is drawn. This practice is justified by the authority of Molloy, b. 2., c. 10., § 16. “Merchants,” says he, “who have generous spirits, will not surprise a man, but will first procure an acceptance, or at least leave the bill for the party to consider, and give his answer.” The chargers did not know that Borthwick had returned to Edinburgh, till the 26th May. The clerk, whom they then sent, did no more than what is customary, in allowing a few days more to Borthwick for accepting or returning the bill. After a delay of no more than eight days, they again sent their clerk to him, on the 5th June, and got back the bill with a protest, dated 31st May. The clerk, upon his own judgment, took a separate protest against Borthwick. At this time the chargers had no apprehension of the circumstances of the drawer: as soon as they were certain of the refusal of acceptance, they made notification to the suspender. Had Borthwick accepted the bill on the 31st May, instead of refusing and protesting, the bill would have fallen due on the 3d June, the days of grace would have run until the 6th June. The chargers could not have protested the bill for payment sooner than that day: if so, then the protest for not acceptance of the 31st May, renewed on the 6th June, and immediately intimated to the suspender, ought to have the same effect that a protest for not payment would have had at the same period. The recourse or not recourse of the chargers against the indorser, could not depend upon the acceptance or not acceptance of Borthwick at that particular period. The form of the protest against Borthwick, on which the suspender founds so much of his argument, was the operation of the charger’s clerk, in their absence, and without their knowledge. Whether he did right or wrong in this, it is evident that he did not mean thereby to establish a charge of undue negotiation against his masters.

2do. “Supposing recourse did not strictly lie upon the bill, yet, the chargers having gratuitously executed the suspender’s mandate, and advanced their money for him, he stood bound to repay them, without their being put to any trouble, or incurring any hazard.”

From the state of the facts, it appeared that the chargers acted gratuitously for the suspender; advanced their money, and gave their pains, without seeking that reward which they were entitled to demand, and the suspender bound to

pay. As they desired no more than to be reimbursed, they were entitled to this without expense or hazard. Suppose that the suspender had done what the chargers at first desired him to do;—had ordered his correspondent at Edinburgh to pay them the money; that, the first time they happened to be in Edinburgh, they had called for this correspondent, and found that he was not in town; that they had called a second time, as soon as they conveniently could, and had been answered with excuses and promises; and that, upon calling a third time, they had found he was become bankrupt:—In such case it cannot be disputed that the loss would have fallen on the suspender, not on the chargers, who, as they reaped no advantage, could run no risk. The case which has happened is, in every material circumstance, the same.

But, *Stio*, "As the bill was taken by the chargers only in security, or to be credited when paid, the suspender cannot liberate himself from his obligation of debt, under the pretence of failure in negotiation of the bill." It will be observed, that the suspender stood debtor in the chargers' books for L.129:1s. sterling. Above a month before, he sent them the bill on Borthwick. In their letter, acknowledging the receipt of it, they added, that, when paid, it should be noticed, &c. This was a declaration that they accepted the bill only in security of the debt due, and that they understood they were to be at no hazard or trouble in exact negotiation; that they were not to pass it to the suspender's credit until paid; and that they were not to give him any more early notice of the fate of the bill. In these conditions the suspender tacitly acquiesced: he cannot now throw the hazard of this bill on the chargers. If Borthwick had been a creditor of the suspender, he would have been founded in a claim of compensation or retention, because the bill was indorsed to the chargers, not for value instantly paid, but only in security of their debt, or in satisfaction when paid,—15th January 1708, *Crawford*. Upon the same principles, the chargers could not be bound in exact diligence, for that indorsees in security are no more bound to exact diligence than assignees in security. So the question was determined in the case, *Alexander against Cumming*, 9th January 1758, *New Collection*. The suspender, sensible of the weight of that decision, opposes to it the judgment in the last resort, *Grosset against Murray*, the receiver-general, March 1763. That case, however, was ultimately determined upon specialties, independent of the principles for which the chargers contend. There the bill was indorsed by Grosset to the receiver-general, in November 1747; it was payable in February 1748; it was not protested till August 1748, nor was notification of its dishonour made to Grosset till January 1749, five months after the protest, and a considerable time after the utter insolvency of Drummond, the acceptor. It moreover appeared, that the collectors of the customs, such as Grosset, were, by their instructions, authorised to remit the money collected by them to the receiver-general either in cash or bills, and the receiver had a salary allowed him for negotiating such bills. It further appeared, that the receiver-general or his deputy, as taking the hazard of those bills upon themselves, did frequently suffer them to stand out unpaid; and, in return, had the benefit of the interest falling due on them. And lastly, when the bill in question was protested, the receiver-general filled up the indoration "as value, being his Majesty's money;" and he afterwards made oath that the acceptor was indebted to the crown in the contents, and thereupon obtained a writ of extent against his estate and effects.

These specialties exempted that case from the general rules for which the chargers contend. It is farther to be remarked, that, in the case *Grosset* against *Murray*, it was proved, by the evidence of the most eminent merchants, that, when bills are indorsed in security, or to be applied in extinction of a debt when paid, the indorsee is not held in practice to be bound even to protest such bills, unless he be particularly desired. Grosset admitted the justice of this rule; but he ultimately prevailed by showing that it was not applicable to the circumstances of his case.

“The Lords suspended the letters *simpliciter*.”

OPINIONS.

AUCHINLECK. The question is, What was the nature of the right granted to Falls, whether in payment or in security only? The bill was transmitted by Porterfield, taken by Falls, under the condition when paid. This did not bind them to take it in payment, but to do the needful for recovering payment. Were they not obliged to do some diligence, their correspondent would have been in a miserable situation. The next question is, Whether there was proper negotiation in this case? A bill, payable at sight, differs from a bill payable at a day certain; for the holder of a bill at sight may present sooner or later at his convenience: but here the bill was not accepted by Borthwick, when presented: intimation ought to have been to Porterfield: this neglected, no recourse.

GARDENSTON. If the *porteur* negotiates, and does not obtain payment, he has recourse; but not, when, instead of negotiating, he sits with his hands across.

ALEMORE. This bill was contended to be in payment. Suppose Falls had ordered the money to be sent to a particular person, any loss thence arising would have been theirs: So here they ordered a bill on Edinburgh at sight. The case of *Cumming* against *Alexander* is not fit to be a precedent. The case *Murray* against *Grosset* was determined upon this, that exact negotiation was always required. The like was determined in the case of *Haliburton* and *Brebner*.

PRESIDENT. This bill was granted *in solutum*, so far that Falls ordered the money to be sent, and got the bill upon sight in return of that order.

COALSTON. Upon the supposition that here a security alone was received, which I incline to believe, I doubt whether there was any need of negotiation at all.

1766. June 18. ANN MURRAY against ELIZABETH DREW.

BILL OF EXCHANGE.

The Drawer of a Bill, bearing to be “for value received,” having, in the course of an action on the Bill given different and inconsistent accounts of the cause of granting; *found* that he must prove onerousness.

DAVID Drew, merchant in the isle of Whithorn, acquired some fortune by

merchandise. He had a sister-german, Elizabeth Drew, and a sister uterine, Ann Murray, the pursuer and defender in this action. On the 12th May 1760, David Drew executed a disposition of his whole estate, heritable and moveable, in favour of Elizabeth Drew, his sister-german. He burdened her with a legacy of £100 sterling to the children of Ann Murray, and with an annuity of £3 sterling to Ann Murray herself,—“it being an express condition of this grant, as to her, that she shall behave herself to the satisfaction of Hugh Hawthorn of Castlerig.” On the 2d March 1761 he granted a factory for the management of his affairs to Alexander Laurie, son-in-law of Elizabeth Drew. This factory proceeded on the narrative, that “in the present state and circumstances of my health, I cannot manage, follow forth, and pursue my business and affairs as formerly.” On the 21st March 1761, David Drew, as it is said, signed, as acceptor, a bill, drawn on him by Ann Murray, for the sum of £65 sterling, bearing for value received, and payable fourteen months after date: Neither the body of the bill, nor even the word *accepts*, is in the handwriting of David Drew. In December 1761, David Drew died, and was succeeded in his fortune by Elizabeth Drew, his universal disponee. In July 1763, Ann Murray insisted, before the Sheriff of Wigton, in an action against Elizabeth Drew, for payment of the bill of £65 sterling. By her first plea, before the Sheriff, she set forth that the bill had been granted as a donation, or as a remuneratory acknowledgment of her services in managing the mercantile and domestic concerns of David Drew. She afterwards pleaded more definitely, that, if it were necessary to prove the bill onerous, she was ready to prove, by her own oath, that she had performed services to her brother, and that she got the bill for those services. The Sheriff found that no action could lie upon the bill, because it was acknowledged to be a legacy or donation. This judgment being pronounced, Ann Murray preferred a reclaiming petition, wherein she set forth that her procurator had given an imperfect view of the arguments which she had furnished to him; that the remuneration for her services had no connexion with the bill; and that those services still remained due. She pleaded that she had been in the practice of borrowing from and lending to her brother, David Drew; that at the date of the bill matters were stated between them; and that there came out in her favour a balance of £65 sterling, the sum for which the bill was granted; and this also she offered to prove by her own oath. The sheriff-substitute, without allowing Elizabeth Drew to see and answer this reclaiming petition, *de plano* allowed Ann Murray to instruct the onerosity of the bill by her own oath. Elizabeth Drew removed the cause from the Sheriff by advocacy. Before the Lord Stonefield, Ordinary, Ann Murray pleaded a new defence in support of the bill, namely, that she had put a sum of money into the hands of her brother, in order that he might therewith purchase goods for her in England, and that, as his health prevented him from so purchasing, the bill was granted by him as a document of the money having been put into his hands.

On the 12th June 1765, the Lord Ordinary assoilyied Elizabeth Drew.

On the 27th November, and 13th December 1765, and on the 12th February 1766, he repeatedly adhered. Ann Murray reclaimed, and answers were put in to her petition.

LORD HAILES.

ARGUMENT FOR THE PURSUER :—

The bill in question bears to be granted for value, and it cannot be disproved but *scripto* or *juramento* of the drawer : the value given was money lodged in the hands of David Drew for the purchase of goods which, in fact, he did not purchase. The pleas, that the bill was a donation, or remuneratory, or for the balance of accounts, were pleas injudiciously and unwarrantably made by the country procurator ; and the consequences would be dangerous were such hypothetical allegations held equivalent to the formal assertion of the parties themselves, or of their counsel in the Supreme Court. But, supposing the bill to have been gratuitous, it is not a decided point that a donation may not be constituted in the form of a bill. Bills were first received into Scotland with a view to mercantile transactions, and in some sort contrary to the nature of legal securities : At first they respected foreign commerce, afterwards they were extended to inland trade, at last they came to be used in all transactions indiscriminately, whether of a mercantile nature or not. Thus bills are every day drawn and accepted by men who do not come under the denomination of merchants. Thus, in practice, inland bills, instead of being reputed mercantile transactions, are considered as mandates given by one party and accepted by another. Now the proper idea of a mandate is that of a contract purely gratuitous ; insomuch, that, if a valuable consideration intervene, it is no longer a mandate, but the contract *locati conducti*. The last decision of the Court pronounced upon this question shows that a donation may be properly constituted by a bill. On the 8th February 1753, a question was determined between John Barbour and Agnes Hair. Humphrey Barbour, some days before his death, delivered two bills to his wife, indorsed blank, and used expressions, at the delivery, implying his desire that she should keep them to her own use. The executors of Barbour pursued her for delivery of those bills. “ The Lord found the bills in question were properly conveyed to the defender, and therefore sustained the defence against the delivery.” Were bills an inhabile method of making a donation,—*a fortiori*, the indorsation of bills, especially when indorsed blank, is an inhabile method of making a donation. The inexpediency in the one case is greater than in the other : for a bill indorsed blank may be lost or stolen, and thus may be transferred without the intention of the indorser, whereas an acceptor can never bind himself without intention. But supposing the plea urged by the pursuer’s procurator to have been true, namely, that the bill was granted on account of services performed to David Drew, it follows that the bill was not gratuitously granted. The acting in the quality of a servant is a valuable consideration ; a bill for money, granted on such account, cannot be gratuitous, and it is customary to grant bills for servants’ wages in this form.

ARGUMENT FOR THE DEFENDER :—

The bill in question is in itself suspicious : the name of David Drew is adhibited to it, and no more but his name : even the word *accepts* is in another hand. The bill bears to be granted some few days after David Drew had formally declared himself unable to manage his own affairs. It is made payable at the distance of fourteen months ; that is, it was plainly to be due not till after the death of the granter : add to this the various and inconsistent accounts which the pursuer has given of the cause for which the bill was granted, and

a violent suspicion will arise that David Drew was imposed upon ; possibly by signing as acceptor when he meant to sign as drawer. The pursuer, after having pleaded before the inferior Court that the bill was granted as a donation, or as remuneratory of services, cannot be admitted to plead upon causes totally different. That a donation cannot be constituted by bill is a point determined, 13th February 1724, *Huttons* against *Hutton* ; 9th November 1722, *Fulton* and *Clark* against *Blair* ; and 3d December 1736, *Weir* against *Parkhill*. The case *Barbour* against *Hair* was determined upon this, that the delivery of an indorsed bill was equivalent to an absolute immediate payment of money. Although mandates be considered, in the Roman law, as gratuitous contracts, bills cannot be considered in that view. They cannot be considered as gratuitous between the debtor or acceptor, and the creditor or *porteur*. He who has effects in his hands, is bound to accept or obey the order to pay. He who, without having effects in his hands, obeys the order, is still entitled to commission, exchange, or other valuable consideration. The pretence of the bill having been granted as remuneratory of services done to the brother, cannot be received without full evidence, and the pursuer's offer to prove this by her own oath, will not be considered as evidence ; when it is acknowledged that other causes of granting the bill were also assigned by her, and in like manner offered to be proved by her own oath. As often as she found herself driven from one defence in fact, she resorted to another ; and, for proving all those defences, however contradictory and inconsistent, she still made reference to her own oath.

"The Lords found that the pursuer must instruct the onerous cause of the bill in question, according to her allegations in Court."

Act. A. Crosbie. Alt. G. Wallace.

OPINIONS.

PITFOUR. The decisions *Hutton* and *Fulton* both proceed upon this, that a bill is not a habile method of constituting a legacy. The case *Weir* against *Parkhill*, 1736, collected by Mr Alexander Hume, was of a bill which bore, *in gremio*, payment of a legacy. Where the bill so bears *in gremio*, the objection is good : but to go farther, and to enter into the investigation of the cause, where a bill bears for value, would be going too far. There is no evidence of a gratuity in this case, nothing but the clatters of a country procurator.

AUCHINLECK. Bills have been introduced for the sake of commerce *contra communes juris regulas*. Bills for gratuities are void : not because so expressed ; for, if such cause had been lawful, the expressing the cause would not have hurt the bill. This case gives a strong view of the bad consequences arising from the extension of bills to causes not commercial.

BARJARG. The bill bears for value, and this must be held to have been the cause until the contrary be proved.

JUSTICE-CLERK. Drew was *moribundus* when this bill was signed. It was signed nineteen days after he had granted a faculty declaring himself incapable of managing his own affairs. The pursuer's procurator offered a clear categorical state of facts, asserting the bill to have been granted as a gratuity. The pursuer afterwards changed her ground, and, with equal precision, asserted

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that the bill was granted for services. This, according to her latest assertion is altogether false.

KAIMES. There is some difficulty in holding the acknowledgment of the procurator, that the bill was gratuitous, to be equivalent to the pursuer's own acknowledgment; but this difficulty is removed when her vacillancy, during the whole process, is considered.

GARDENSTON. The allegation of Drew's incapacity is nothing; for the only evidence of his being incapable arises from his being capable to grant a factory. There is no evidence that the bill is false. Services performed by relation is an onerous cause.

COALSTON. The bill bears for value: the objector must prove the contrary. But here the difficulty lies, that the holder of the bill has given different and inconsistent accounts of the cause of granting.

PRESIDENT. Those decisions are good which found that bills debording from their proper form are not probative. The plea of services not relevant as was determined 11th February 1761, *Wright*. The whole circumstances of the fact bear against the pursuer. The *onus probandi* lies on her to maintain her last allegation that the bill was granted for value actually received by Drew.

1766. June 19. WILLIAM RORISON, Factor on the Sequestrated Estate of Barscob, against JAMES SHAW, servant to Patrick Heron, of Heron, Esq. and OTHERS.

Persons carrying off a tenant's cattle, while subject to the hypothec, not liable to the landlord who had done no diligence within three months.

[*Faculty Collection*, IV. 69; *Dictionary*, 6211.]

ROBERT M'LELLAN, of Barscob, granted a lease of the mains of Barscob and others, to William M'Clurg, for the yearly rent of L.40 sterling. The lease commenced with the year 1759, and ended with the year 1763. M'Clurg, the tenant, was a dealer in cattle, and, by bargains of that nature, became debtor to James Shaw and others. He granted bills to them in 1761, 1762, and 1763 for the sums in which he had thus become indebted. About the beginning of the year 1763, they demanded payment, as it is said, and he told them it was more convenient for him to pay them by the delivery of some cattle which he had to sell, than by payment in money. To this proposal of sale, Shaw and the other creditors agreed; they bought from him cows, sheep, &c., and it was agreed, as the creditors contend, that the cattle should be pastured on M'Clurg's grounds until the month of May 1763. Accordingly, M'Clurg kept the cattle till May 1763. On the 17th of that month, Shaw and the other creditors openly took possession of the cattle, drove them off M'Clurg's grounds without challenge, and gave him credit for their prices, by marking payment to that amount on the back of their bills. On the 2d August 1763, the Court of Session se-

questrated the estate of Barscob, and appointed William Rorison their factor thereon. On the 6th September 1763, William Rorison executed a summons against Shaw and the other possessors of the cattle, setting forth, that they had carried off, from the mains of Barscob, black cattle, sheep, and lambs, to the value of L.60 sterling; that no proper stock or subject had been left upon the lands for payment or security of the rent then due by the tenant; and therefore concluding for payment of certain arrears of rent due by M'Clurg preceding Whitsunday 1763, with L.10 sterling more, as the rent due from Whitsunday to the August 1763, or at least of L.60 sterling, as the value of the said cattle.

The Steward of Kirkcudbright found the defenders liable in the sum of L.40 sterling, with interest from the 17th May 1763, the date of the delivery, proportionally to the sums respectively discounted on their bills, in respect that the proprietor had a right of hypothec subsisting upon the said stock, to the amount of one year's rent, at the time the said cattle and sheep were intromitted with by the defenders. The defenders removed their cause into the Court of Session by advocacy. On the 29th January 1765, the Lord Stonefield, Ordinary, "remitted the process, with this instruction, that the Steward-depute inquire into the quantity of corns, cattle, and other stocking left on M'Clurg's farm at the time the cattle and sheep were taken away by the defenders."

On the 18th December 1765, the Lord Ordinary, having advised representation and answers, pronounced the following interlocutor: "In respect that the right of hypothec, competent to the pursuer, was not insisted in within three months of the term of payment of the rents libelled; alters his former interlocutor, advocates the cause, assoiliys the defenders, and decerns."

The pursuer reclaimed to the Court: the petition was remitted to the Ordinary. Having heard parties, he took the debate to report.

ARGUMENT FOR THE PURSUER:—

Anciently, by the law of Scotland, the whole corn and cattle upon a farm were held to be the property of the landlord, and accordingly were attachable for his debt. This was considered as a grievance, and therefore the statute 1469 provided, "That the poor tenant shall not be distressed for the lord's debt, farther than to the extent of a term's maill." Even this provision has gone into desuetude: the right of property in the landlord has worn out by degrees, and nothing remains to him but his right of hypothec upon the fruits and stocking for one year's rent. The full exercise of this right of hypothec, as respecting cattle, was found to be adverse to commerce between man and man; it therefore became necessary to fix a period at which such right of hypothec in cattle was to determine. This was done by the decisions of the Court, particularly in that, — *January 1726, Hepburn against Richardson*, observed by Lord Kaimes in his first collection. By it, the hypothec was limited to three months after the last term of payment. After the lapse of three months, the cattle are freed from the hypothec, and are attachable by creditors; but, before, they are attachable by the masters. A creditor, who carries off the cattle before the lapse of three months, must be liable in a year's rent to the master, if such year's rent be due by the tenant. Thus, then, the creditors of M'Clurg, by carrying off the cattle, became liable to the landlord, or his creditors, in the year's rent. The question is, at what time they became

liberated from this obligation to which they were once liable? There are no authorities in law, nor is there any reason for limiting this obligation to the term of three months after the last term of payment. Were it held as law, that a landlord loses his right of hypothec unless he bring his action for payment of his rent within three months after the last term of payment, the right of hypothec would become elusory. Thus, suppose a landlord should send his officer to poud for his rent, the day before the three months were expired, and that, before the officer arrived, a creditor of the tenant's had carried off the whole stocking on the farm; in such case, it would be too late for the landlord to pursue, on the day following, either the tenant or his creditor. The only solid ground upon which the determination of the present question can rest, is this, that, as the hypothec lasts for three months, so, during the currency of that term, the cattle must remain upon the ground for rendering the hypothec effectual. No law requires that the master should attach the hypothec on the first day after the last term of payment, or at any time before the expiry of three months from that period. The cattle, therefore, during all that period, must be subject to the preferable right in the landlord; and if they are abstracted from his diligence, they, or their value, must be replaced. In this case there was no undue delay on the part of the pursuer: his commission was not dated till the 2d August 1763: before his commission could be read in the minute-book, extracted, and sent into the country, the three months from the last term of payment were elapsed. On the other hand, the defenders are not strangers who had recently contracted with M'Clurg, but his creditors by bill, endeavouring to elude the hypothec.

ARGUMENT FOR THE DEFENDERS:—

A right of property and a right of hypothec are wholly distinct. *Pignus* is *jus in re*, as well as *dominium*, yet still *pignus* and *dominium* are separate rights. Hence a landlord, having a hypothec over the moveables of his tenant, or a creditor over those of his debtor, is not thereby proprietor of such moveables. The *jus pignoris* is in the landlord or creditor, the *jus dominii* in the tenant or debtor. The right of the creditor *hypothecarius* is a real security affecting the things hypothecated, and this right may be made *subsidiarie* effectual *adversus quemcunque possessorem*. Many hypothecs were allowed by the civil law, which, from the necessities of commerce, have been rejected by modern nations, and particularly in Scotland. The law of Scotland has, however, allowed the hypothec upon fruits, in favour of the landlord; and, being feudal in its principles, has extended this hypothec to cattle, which the Roman law did not. The principal security is that over the fruits; that over the cattle is secondary. Stair, b. 1., tit. 13., § 15:—"With us there remains the tacit hypothecation of the fruits on the ground, in the first place, and, they not satisfying, of the other goods." Hence the hypothec over the fruits has been held to be stronger than that over the cattle on the ground. The former is perpetual, whereby each crop always remains hypothecated for the rent of that crop; the latter is only temporary, and practice has limited its endurance to a precise period. If the landlord does not use his right within three months after the last conventional term, at which the rent becomes payable, he loses his right altogether. Bankton, vol. 1., p. 386; Erskine, b. 2., tit. 6., § 23. And thus it was found, January 1726, *Hepburn* against *Richardson*:—"That the master has three months after the term of payment to do diligence upon his hypothec, against his tenant

and stocking." When the Court found that the hypothec expired in three months, it meant that in three months the landlord loses his real right of attaching or recovering the goods, unless he takes some document thereon before the expiry of three months : that therefore he cannot detain cattle remaining upon the farm, nor reclaim those taken off, for a longer period than three months. The obligation on the intromitters cannot last longer than the hypothec itself, and this hypothec is limited to three months. Many are the methods by which the landlord may secure payment during that period. He may hinder the cattle from being carried off, unless payment or security for the rent be offered ; he may bring them back *de recenti* ; he may commence a process for restitution ; he may obtain a sequestration ; he may poind them for the [rent ;] but he cannot, after the lapse of the three months, detain the cattle, prevent their sale, or hinder them from being attached ; and, of consequence, he cannot, after the lapse of the three months, insist in an action against the intromitters with them. The action upon a real right cannot subsist longer than the real right itself. It will not vary the case that the factor had it not in his power to bring the action within three months from the last term of payment. This may show that he was guilty of no neglect, but it will not extend the right of his constituents. The real action was lost by the fault of the creditors, who did not apply for a sequestration at a more early period, whereby the factor appointed might have done diligence within the three months. The creditors of a tenant are in a more favourable situation than the landlord is : they claim no more than the common right of parties contracting ; but he claims upon an extraordinary privilege.

"The Lords adhered to the last interlocutor of the Lord Ordinary."

Act. P. Murray. *Alt.* G. Wallace. *Reporter*, Stonefield.

OPINIONS.

PITFOUR. The action at the instance of the master expires in three months. The hypothec is a security to the master ; it only affects the same goods for the same year : two hypothecs cannot subsist together : Easy to apply this to corn. One may purchase if he sees the master's discharge for that year : this leads to an ambiguity with respect to goods,—for to what year are they to be applied ? The rule is, that the master has an hypothec for the goods at Whitsunday 1760, for the crop 1759 payable in 1760. There is an error in the pursuer's argument, as if the Lords prorogated the hypothec for the three months : This is not done ; and it is impossible that it can be done, for a hypothec can only be for one year's rent, whereas, if the hypothec subsisted for crop 1759, after Whitsunday 1760, or the last term of payment for that year's rent, then the hypothec between Whitsunday 1760 and the term of three months from that date would be a hypothec both for the crop 1759 and the crop 1760, at one and the same time. What the Lords did was this : they granted a reasonable time for recovering the hypothec, but they did not grant any new hypothec.

COALSTOWN. I always imagined that the goods must remain on the ground, for three months, otherwise that action lay *quandocunque* against intromitters. In the case *Hepburn* against *Richardson*, the Court extended the hypothec for three months, whereby the hypothec was good for one year and also for three months after that year.

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KAIMES. I deny that the hypothec ceased at Whitsunday ; for, if it did, h could the master attach the cattle at all. If the hypothec right expires af three months, then it expires by prescription, and this prescription not ge against the factor, who was *non valens agere*, until the 2d August, the date his commission, (*vellem indictum* ; for how could one be *non valens agere* 1 fore the existence of a right.)

AUCHINLECK. After the three months, every one is at liberty to buy : one buys within the three months, and no challenge is brought within the thi months, he is safe.

GARDENSTOUN. The right of hypothec is limited to the year ; the right action is limited to three months after the year.

PRESIDENT. The factor insists for the hypothec of the former year. T Court allowed three months for that diligence, and no diligence has been do during that space.

ALEMORE. Corn farms and grass farms will then be in a different situation the first will have a substantial, the second, an elusory hypothec. Why shou not the cattle be perpetually liable for the rent of the year ? Says analogy, th should ; expediency says otherwise. Three months are allowed to the mast for making good his hypothec on account of rent due, suppose at Whitsunda if new cattle are brought in after Whitsunday, how can they be hypothecated therefore, the hypothec itself rests, and every intromitter is liable.

HAILES. If the landlord may, after the three months, sue intromitters wi the cattle of his tenant, then his right of action on the hypothec may subsist long as his right of action for the rent. Here the master is in no worse situ tion than if the cattle had been suffered to remain on the ground until the e piry of three months. It is admitted that he did no diligence during the thr months : if he did no diligence against the tenant after the cattle were carri off, it is impossible to suppose that he would have done diligence if the catt had remained on the ground.

Dissent. Alemore, Coalston, Elliock, Barjarg.

1766. June 23. SIR THOMAS GORDON of Earlstown *against* JAMES MURRA of Broughton.

[*Faculty Collection*, IV. 216 ; *Dictionary*, 16,818.]

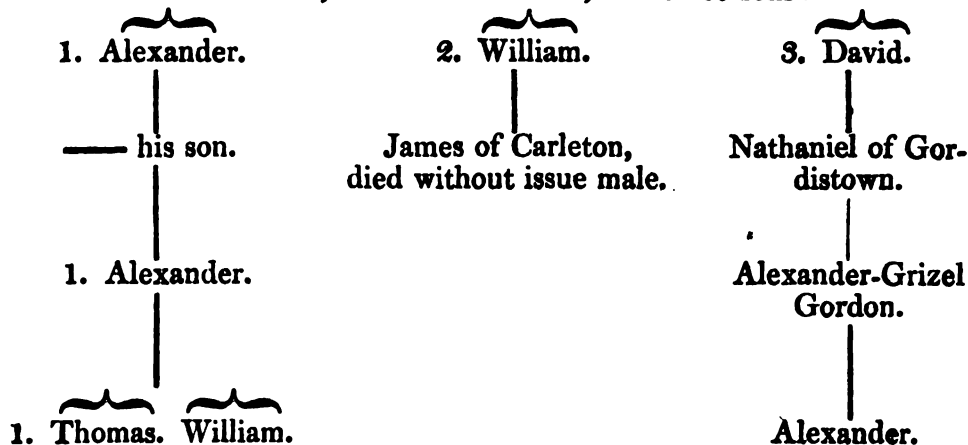
TAILYIE.

A. possessed an Estate under an Entail, not Recorded nor completed by Infeftment. H paid certain debts of the Entailer, on which Adjudications had been led, and acquire right to the adjudications. *Found, lmo*, That the Entail was effectual against the Cr ditors of A. *2do*, That the Entail could not be defeated in favour either of A or h Creditors by the Adjudications to which he had acquired right, and which were founde on as a separate title of property.

For understanding the question between those parties, it is necessary to stat the genealogy of the family of Gordon of Earlston.

DECISIONS REPORTED BY

John Gordon of Earlston, the common stock, had three sons :



On the 15th April 1684, James Gordon of Carleton, by a holograph deed, executed a strict entail of his estate of Carleton, which belonged to him in right of his father William, who had married the heiress of Carleton. By this deed he called the heirs-male of his own body, John Gordon, third son of William Gordon of Earlston, Nathaniel Gordon of Gordistown, James Maitland, and the respective heirs-male of their bodies, and their heirs-male *successive*; whom failing, to any other person or persons he should nominate by a writing under his hand; and, failing such nomination, to return to his own heirs-male whatsoever and the heirs-male of their bodies. James Gordon, the tailyer, had no male issue of his body; John Gordon, substituted to them, died without male issue. The tailyer executed no nomination of substitutes. James Maitland, and his male issue, also failed, and thus the substitution resolved into this, to Nathaniel Gordon, and the heirs-male of his body, whom failing to the heirs-male whatsoever of the tailyer, and the heirs-male of their bodies. The intention of the settlement made by James Gordon of Carleton was declared to be for the payment of his just debts, and for the continuance of the estate in his family succession. The settlement is "with the burdens, and under the restrictions, provisions, and conditions," &c. therein after mentioned, "and no otherwise." The procuratory of resignation for new infeftment to be granted to the heirs of tailyie, is granted under the following conditions: "They, and each of them that so enjoys the benefit of the said estate, nowise breaking, altering, or innovating the aforesaid tailyie and order of succession, nor yet selling, wadsetting, impignoring, nor any ways away-putting, either legally or conventionally, my lands or estate foresaid, nor granting any annualrents nor yearly duties forth thereof, nor contracting debts, nor doing any other deeds, directly or indirectly above the equal of the full value thereof, whereby the same may be apprised, adjudged, or otherwise evicted in law from them, or any of them, in prejudice of the foresaid tailyie, but preventing, *debito tempore*, all inconveniences whatsoever that may anywise occasion the eviction of my said estate, and extinction of the said tailyie; wherein if they, or any of them, and their heirs and successors in time coming, shall anywise failyie or contravene in any point or article hereof, then, in these, or any of these cases, all such facts, acts, and deeds so done, or to be done, contrary or prejudicial hereto, are here-

by declared not only to be void and null in all time coming, without any declarator to follow thereupon, but also the person or persons so contravening, each of them, and their heirs abovesaid, shall from thenceforth lose and amit my lands and estate aforesaid, and haill benefit thereof, and be totally excluded therefrae, siclike as if they were naturally dead, and the same shall, in that case, fall and accresce to the next substitute person and heir of tailyie." Carleton reserved power to himself to alter and revoke the premises at pleasure; to sell the lands, or to contract debts without limitation: "All which," says the settlement, "my said heirs of tailyie succeeding to, and taking the benefit of my said estate, shall, by their acceptance hereof, be holden and obliged to pay, fulfil, and observe, in all points, and to relieve my heirs of line thereof."

This entail, like many others executed before the statute 1685, was not registered in the record of tailyies: it remained personal, and was never completed by infestment in the person of the tailyier himself or of any of the succeeding heirs. Upon the tailyier's death, without issue, on the 6th May 1688, the succession opened to John Gordon, third son of William Gordon of Earliston, the first substitute; then a minor. Nathaniel Gordon of Gordiston, as tutor of this John, entered into possession of the estate, and continued to levy the rents until, upon John's death, the succession opened to himself. It seems agreed, in point of fact, that Nathaniel never accounted to John for his intrusions. The debts contracted by Carleton were not cleared by Nathaniel during the minority of John the substitute,—on the contrary, the creditors therein took decreets of constitution and adjudication. More particularly, 1mo, George Fullerton of Dreghorn, on the 18th January 1693, obtained adjudication in payment of the accumulated sum of L.2445:3:4. Scots. And in the same year obtained a charter of adjudication under the great seal, was infest, and had his infestment recorded. 2do, John Martin, writer in Edinburgh, on the 21st November 1694, obtained adjudication for the accumulated sum of L.808 Scots. 3tio, On the 9th July 1696, Mr George Rome obtained adjudication for the accumulated sum of L.4512 Scots. On the 23d March, Nathaniel Gordon acquired right, in name of a trustee, to Rome's adjudication. On the 12th December 1702, Nathaniel Gordon expedes a general service as heir of tailyie to Carleton, but without reciting the irritant and resolute clauses of the tailyie, though it refers to it, "*per quod dict. Jacobus Gordon, pro causis inibi specificat. cum et sub oneribus, reservationibus, provisionibus, conditionibus, qualificationibus, et restrictionibus inibi mentionat. dedit, concessit, et disposuit,*" &c.

In the year 1711, Nathaniel Gordon transacted and paid off the adjudications which had been obtained in 1693 and 1694, by Fullerton of Dreghorn and John Martin, and took conveyance thereof in his own favour. These conveyances appear to have been put into the charter-chest of Carleton, where they were lately discovered. Nathaniel, notwithstanding the prohibition in the tailyie, contracted various debts. On the 14th June 1725, Alexander Gordon being about to marry Grizel Gordon, daughter of Sir Alexander and sister of Sir Thomas Gordon; Nathaniel, his father, did, in the marriage-contract, resign the estate of Carleton, and his other lands, in favour of Alexander, and his heirs-male to be procreated of that or any subsequent marriage; which failyieing, in favour of Alexander, his heirs and assignees whatsoever.

This marriage settlement was in fee simple, making no reference whatever to the tailie of Carleton. The marriage was entered into, but no infeftment followed upon the contract, so that Alexander's right remained personal. Alexander Gordon contracted various debts: and, on the 15th April 1728, he entered into a minute of sale with Alexander Murray of Broughton, whereby, for a price therein mentioned, he became bound to dispoise to Broughton certain parts of the lands of Carleton, with absolute warrandice. Broughton also acquired right to certain debts due by Nathaniel and Alexander Gordons. For payment of them, amounting to the accumulated sum of £433 sterling, and in implement of the minute of sale, Broughton, on the 2d July 1735, obtained adjudication of the lands of Carleton against Nathaniel and Alexander Gordons.

On the 26th July 1745, he obtained charter of adjudication under the great seal, and was thereon infeft. The other Creditors of Nathaniel and Alexander did, in like manner, obtain adjudications for their respective debts, in order to be within year and day of Broughton's adjudication. Broughton, instead of insisting on his right, by the minute of sale 1728, did, in the character of creditor-adjudger, bring a process of ranking and sale, as of a bankrupt estate. In this process he called Nathaniel and Alexander Gordons, and their creditors. The lands under sale were sequestrated by authority of the Court. During the dependance of this process, both Nathaniel and Alexander died. Alexander, the son of Alexander, was called into process by diligence, and he pleaded one general objection to all the debts, namely, that Nathaniel, his grandfather, had not made up any proper title for carrying over the personal right; for that he had served himself heir to Carleton the tailyer, instead of serving himself heir to John Gordon, the first substitute, who, it was contended, ought to have been considered as fiar.

On the 27th January 1748, the Lord Kilkeran, Ordinary, "found that the title was properly made up by the service of Nathaniel to James, the maker of the entail."

To this interlocutor the Lords, upon advising a reclaiming petition and answers, "adhered."

Alexander next objected that, by the tailie 1684, the whole heirs of tailie were restrained from contracting debt beyond the value of the half of the estate: That Nathaniel his grandfather, and Alexander his father, contracted debts even to the value of the whole estate, and had thereby incurred an irritancy and forfeiture: That the debts contracted by them were null, and therefore that the estate could not be rendered bankrupt by those debts, nor could the sale proceed.

On report of Lord Kilkeran, 21st June 1749, "The Lords found, that, by the conception of the entail, the person contravening forfeits for himself and his heirs; and therefore it is not competent to Alexander Gordon, the son of the alleged contravener, to object to the debts upon the estate of Carleton."

Alexander reclaimed, and pleaded that this objection was *jus tertii* to the creditors; for that, if he himself was not allowed to plead on the irritancy and forfeiture, the remoter substitutes undoubtedly might. The Court, however, after hearing counsel, on the 14th November 1749, adhered.

Alexander being thus barred *personali exceptione*, appearance was made for William Gordon, writer to the signet, brother of Sir Thomas Gordon, and one of the remoter substitutes in the entail; and the same plea was made for him that was made for Alexander. On the other hand, the Creditors contended that,—the tailie not being recorded in terms of the statute 1685, nor the prohibitive, irritant, and resolute clauses engrossed in the retour of Nathaniel's service, nor in Alexander's contract of marriage, whereby Nathaniel disposed the lands to him,—the Creditors were *in bona fide* to contract, and that at any rate the debts must stand good to the extent of one-half of the value of the estate, as allowed by the entail itself.

On report of the Lord Kilkerran, the Lords, 20th July and 21st November 1753, "repelled the objections pleaded for the Creditors upon the Act 1685, but found that the heir in possession might lawfully contract debts to the extent of the half of the value of the estate."

After this litigation the present Broughton got payment of part of the debts due to his father, out of a separate estate belonging to Nathaniel Gordon, and acquired right to the debts due to sundry of the other Creditors. In 1757 Sir Thomas Gordon of Earlston, having become the next substitute to Alexander Gordon, insisted, in an action, for having it declared that Nathaniel, and Alexander his son, had irritated their rights to the estate, for themselves and their descendants, and that the estate had devolved to him as the next branch in the entail.

On the 27th July 1759, the Lord Coalstown, Ordinary, sustained the pursuer's title, and decerned.

Immediately after this, Mr Murray of Broughton appeared, and produced, as his interest, the minute of sale 1728, between his father and Alexander Gordon, his adjudication 1735, and his charter 1745. He pleaded that he was entitled to the property of the lands sold by the minute of sale, and to the other lands in payment of the debts adjudged for, and that his right could not be hurt by the entail 1684, a latent deed not upon any record, in respect that his authors, Nathaniel and Alexander Gordon, possessed the estate upon titles of property independent of the entails 1684. The titles of property on which he condescended were the three adjudications of the estate of Carleton, 1693, by Fullerton of Dreghorn; 1694, by Martin; 1696, by Rome. In the course of the debate it was thought necessary, by the Court, to try the validity of those three adjudications, and it was ultimately found that Martin's adjudication for £808 Scots was a subsisting adjudication, and unexceptionable; but the other two adjudications were restricted to a security for the sums truly due.

Matters thus standing, the Lord Coalstown, Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER :—

The defender observed, in general, that the adjudications deduced by Fullerton and Rome gave Nathaniel Gordon a right to the estate in security of the debts for which those adjudications were deduced. The right to be carried by the unexceptionable adjudication, that of Martin, was no more than the reversion of the estate after payment of those sums. Those sums would nearly, if

not altogether, have equalled the value of the estate; so that there could be no equity in reponing the debtor against the expiry of the legal in Martin's adjudication, when the reversionary right truly carried by it did not equal the sum for which that adjudication was deduced. The question therefore resolves into this:—Alexander Gordon had a good right to the estate in virtue of Martin's adjudication: Whether then can the personal deed of entail afford a legal objection to the debts due to Broughton, or to the purchase made by his father of part of the lands contained in that entail? As to which question it will be observed,—1^{mo}, That it is an established principle of the law of Scotland, that whoever contracts with a person standing in the right of lands by unlimited titles, cannot be affected by any objection arising from an entail not recorded: That the limitations laid upon property by entails might not prove a snare to third parties, the statute 1685 appointed entails to be published in two different ways: the first publication is that in the investitures of the lands, and it is required that the irritant and resolute clauses be fully engrossed in the charter and seasine. The other publication required by statute, is that in a special register appointed to be kept for that purpose. The statute provided for both those publications: It declares, “that such tailies shall only be allowed in which the irritant and resolute clauses are inserted in the charters and instruments of seasine, and the original tailie produced before the Lords of Session, and the provisions and conditions, with the irritant and resolute clauses recorded in manner therein mentioned.” It is only upon performance of both conditions that the statute declares the entail “to be real and effectual against creditors, comprisers, adjudgers, and other singular successors.” Hence the engrossing the irritant and resolute clauses in the titles of the heir with whom the creditors contracted, was held insufficient, because the entail was not recorded; 8th December 1724, *Creditors of Callender of Dorrater*, and 17th July 1740, *Creditors of Cromarty*. This last judgment was affirmed in the House of Peers. Hence also the registration in the record of entails was held insufficient when the tailie was not completed by infeftment, the heir having a title to the estate independent of the tailie; and so it was determined in 1751, *Creditors of Patrick Oliphant of Bachelton* against *Lord Oliphant*; and lately in the question with *the Creditors of Sir John Douglas*. When indeed the debtor has no other title in his person, but a disposition of lands granted to him by the proprietor, under restrictions, creditors may be affected by such restrictions, though not recorded; and so it was found by the House of Peers in the case of *Westshiels*: And the reason is, because in such case there is no other title upon which the creditor can affect the estate; and this title, being personal, must be qualified by the conditions of it: but whenever the debtor is possessed of another title, so that the creditor is not obliged to connect his title to the estate through the personal deed of entail, then the creditors may safely contract. To apply these observations to the present case; every one, by inspecting the records, might see that the only infeftment by which the lands of Carleton were taken out of the *hereditas jacens* of James Gordon, was the infeftment upon the charter under the Great Seal 1693, proceeding upon Fullerton's adjudication. From the records it also appeared that other adjudications for accumulated sums had been deduced against that estate: That all

those adjudications had been conveyed to Nathaniel Gordon, the nearest heir of the last proprietor, who had deceased without issue, was a fact which every one might know. It is not uncommon for heirs to make up titles to their predecessor's lands by expired diligences, and therefore creditors could have no reason to suspect that there did exist a latent entail. On the contrary, they had great reason to believe that Nathaniel Gordon was an unlimited fiar, when they saw him dispoise the estate of Carleton simply and absolutely to his son Alexander, in the marriage-contract with Grizel Gordon, sister of Sir Thomas, a remoter heir-male of the deceased. The late Broughton could not scruple to lend money to Alexander Gordon, having in his person titles thus unlimited; and accordingly he entered into the minute of sale 1728. At that time, charter and infeftment had followed upon one of the adjudications. This real right was thirty-five years old, and, as no challenge thereof had been brought, there was a natural prospect of every objection being soon cut off by the positive prescription of 40 years. Martin's adjudication, though for the small sum of £808 Scots, is without exception: after the expiry of the legal it must be held a good title of property. In a question with the debtor or his heirs, the law does not require infeftment, either before or after expiry of the legal; neither does it require a declarator of the expiry of the legal; such declarator gives no new right; it only finds that the right had, by the operation of the law, accrued to the adjudger. Neither does the defender's right rest solely on Martin's adjudication. The adjudications deduced by Fullerton and Rome have been sustained, as rights in security for the sums due: those adjudications, with the interest owing at the time of Nathaniel's purchase, will be found to exceed the value of the lands: when, therefore, there is a formal unexceptionable adjudication whereof the legal is expired, and other adjudications less formal indeed, but subsisting as securities for debts nearly equal to the value of the lands, the Court will not open the legal of the adjudication formally deduced, for a sum however small; and so the Court found, in 1740, *Murray of Clardon* against *Sir Alexander Murray and his Creditors*. It is in vain for the pursuer to plead, "that Martin's adjudication did not expire, *quoad* the legal, till 1704; that, in 1702, Nathaniel Gordon made up his title to the entail by a general service, in consequence of which he was bound to prevent the expiry of the legal, and that he could not take the advantage of an expired legal occasioned by his own fault; but, on the contrary, the debts being acquired by Nathaniel Gordon, who was bound by the entail to pay them, they were extinguished *confusione*:" for it will be observed, *first*, that the import of the clause in the entail is, that the heirs shall not contract debts, and, if they do, shall clear the estate of them; but the clause relates not to diligence done for payment of the debts of the maker of the entail. Hence, the facts and deeds done contrary to the entail are declared void and null; which cannot apply to the heir's omission to pay off an adjudication not deduced on his own deed. The clause in the entail which reserves to the entailer the power of contracting debts, and takes the heirs of entail bound to pay the same, &c., is no other than an exegetic clause which is annexed to every reserved faculty, for rendering the debts effectual to the creditors; but it is never understood to preclude the heir from being relieved of the debts out of the defunct's moveables, or, failing them, out of the entailed estate. No man is presumed to entail more than what he has; the lands, in so far as they are burdened with his

debts, do not belong to him. The diligence of creditors must affect them, nor can the heir be bound to extinguish such debts, unless the entailer had left him effects for that purpose. The entail in question contains no irritancy of the heir's right, in the case of his not purging the adjudications, nor even in the case of his possessing the estate upon any separate titles. No funds are set aside for payment of the entailer's debts: the diligence of the creditors must take its course, and thus the property became vested in Fullerton, upon the expiry of the legal of his adjudication, in January 1703, to be communicated always to any creditor who had done equal diligence. The debts of an entailer are not extinguished *confusione*, by being acquired by the heir of entail: so it was found, in the case of *Pitrichie*, 1st December 1757, where the debts were only personal; and this applies *a fortiori* to the present case, where the creditor had, *ab ante*, acquired a property in the estate by virtue of his diligence. The right had become irredeemable in Fullerton, before it was acquired by Nathaniel, the heir of entail. Nathaniel was not bound to extinguish that right; it behoved, therefore, to subsist in his person, as it subsisted in the person of his author, Fullerton.

Secondly, Although it were supposed that the clause in the entail bound the heirs, under an irritancy, to purge adjudications deduced for the debts of the entailer, yet this could have no effect while the irritancy was not declared nor the entail known. No creditor could have discovered this entail from the strictest search into the records. There was no infeftment upon it: the only infeftment after the death of the entailer, was that of Fullerton, which had become an irredeemable right of property before the creditors contracted with Nathaniel Gordon and Alexander his son. It must be admitted by the pursuer, that, if infeftment had followed upon the minute of sale, 1728, any objection competent against Nathaniel and Alexander Gordons could not have been competent against Broughton the purchaser. See 27th June 1737, *Bell against Gartshore*, Dictionary, vol. I., page 183. Now, it is apprehended that the minute of sale, 1728, was made real by infeftment. It has been observed, that the adjudication deduced by Broughton's father, bore, both for implement of the minute of sale and for payment of the debts: that, on this adjudication, a charter was expedite, and infeftment taken by the adjudger. The *quæ quidem* of the charter does not, indeed, set forth, that the adjudication was deduced upon the minute of sale; but, as the adjudication was as much in implement of the minute as for payment of the debts, every thing in the adjudication must be comprehended in the charter, and the infeftment will extend to the one particular as well as the other. But, although the adjudication had been deduced only for payment of the debts, and no infeftment had followed upon the minute of sale, yet it is apprehended that the irredeemable right to the lands was fully vested in Broughton. When a creditor is infeft upon a charter of adjudication, the feudal right to the lands is vested in him, but subject always to the legal reversion. When that right of reversion is cut off by the elapse of ten years, the right of the adjudger becomes an irredeemable right of property, and the aid of a new infeftment is not required. In the like manner, if the debtor should, before the expiry of the legal, grant a discharge of his right of reversion, the adjudication would become an absolute and irredeemable right of property, in consequence of the former infeftment; and the right of reversion, being personal,

would require no new infeftment. Thus standing the case, a minute of sale entered into betwixt the adjudger and the debtor, and conveying an irredeemable right to the lands, must imply a discharge of the right of reversion. Nor will it vary the case that the adjudication followed after the sale instead of preceding it; for an infeftment upon an adjudication vests the feudal right in the adjudger, and the sale, whenever made, must convey all that remains with the debtor, and be equivalent to a discharge or conveyance of the right of reversion. But farther, the late Broughton may be said to have entered into the minute of sale upon the faith of the records. When he made his purchase, he must be presumed to have consulted the records. From them he must have seen the complete feudal title, by the adjudication deduced in 1693, with charter and infeftment thereon. As he could see no later infeftment upon record, he must have concluded that the estate was possessed in consequence of those titles. Supposing, however, that he knew nothing of the adjudication 1693, yet still it would be available to support his purchase. No entail, unless duly recorded in terms of the statute 1685, can affect purchasers: private knowledge of the existence of an entail is of no moment. It is true that, when an entail is not clothed with infeftment, the conditions and provisions therein will be good against purchasers from one who has no title to the estate but such entail; for a purchaser cannot object to conditions and provisions in a deed, by which alone he can plead a right to the estate; but, whenever the seller has a separate title to the estate, which of itself would be sufficient to a purchaser, then the purchaser is not bound to acknowledge any other title, such as an entail. It was because there were not two separate titles in the heir of Westshiel, that judgment was pronounced against him. From the principles here laid down, it is held to be law, that, when one who is both apparent heir of the former investitures and heir of entail, does contract debts, even without making up titles, those debts will be effectual against the estate, notwithstanding the entail: for that the estate may be carried by an adjudication, upon a special charge against him as heir of the former investiture, and the entail will not be acknowledged at all: and so it was lately determined in a question among *the Creditors of Douglas of Kelhead*. It matters not that the creditor, at the time of the debt being contracted, was not aware that the estate might be so affected, or that he did not know of his debtor having any estate at all; and thus, if a debtor, even after contracting debt, should succeed to an estate entailed, but without record, such estate might be affected by his anterior creditors. In like manner, the separate title in the person of Alexander Gordon would be available to Broughton, at whatever time he came to discover the existence of such separate title.

ARGUMENT FOR THE PURSUER:—

It was understood by all parties concerned, that the only right of Nathaniel Gordon, was the entail 1684; that, upon it, he established his title by service as heir of tailyie and provision, and, upon it, that he took and continued possession of the estate. Nathaniel, by acquiring the adjudications after he had acknowledged the succession through the entail, did no more than what he was bound to do by acceptance of that right; that is, he paid the debts of the entailer, and extinguished them in his own person. Neither Nathaniel nor his son Alexander ever attempted to set up the adjudications as a preferable right

or title of possession. Such also was the sense of the creditors, especially of Broughton. The various questions litigated by them during the course of many years, afford evidence of their sense of the matter. The questions, Whether Nathaniel was properly served heir of entail and provision to the entailer himself? Whether the not registrating the entail in terms of the statute, 1685, could be available to the creditors of Nathaniel and Alexander? Whether the estate could be brought to a sale by Broughton, a creditor adjudger? Whether Alexander, the second, was barred from pleading the nullity of the debts, in consequence of irritancies incurred by his grandfather and father? and, Whether the debts contracted beyond one half of the value of the estate, ought to subsist to the extent of that half?—All those questions were foreign to the purpose, upon the supposition that Nathaniel held the estate in virtue of the adjudications, not in virtue of the entail 1684. As to the defence founded on the statute 1685, “That the entail 1684 was not recorded in the register of entails, nor its prohibitive, irritant, and resolute clauses repeated in Nathaniel’s general service, nor in his disposition to his son Alexander, and, consequently, that those clauses affect not creditors or purchasers:”—this defence was overruled in the former question with Alexander Gordon, the second. But, independent of this, it will be observed, that the provisions of the statute, 1685, relate not to the case of those who contract upon the faith of rights merely personal. And so it was found in the last resort, in the case of *Westshiel*, and has, ever since that judgment, been held as law. This argument proceeds upon the supposition, that Nathaniel’s only title was in virtue of his general service as heir of entail. For proving this proposition, the following circumstances will be observed:—*1mo*, The entail was intended for the special purpose of paying the debts of the entailer, and one half of the estate was left free for that purpose; *2do*, As the heirs of entail were taken bound to pay the debts of the entailer, and to relieve his heirs of line thereof, so they were taken bound to do nothing that might prejudice the right of succession thereby established; *3tio*, That Nathaniel Gordon, acknowledging this entail to be his only right to the estate, made up his titles accordingly, and possessed accordingly; *4to*, That Martin’s adjudication, the only one now subsisting as a right of property, was not acquired by Nathaniel until 1711, after that he had been nine years in possession, by virtue of his general service as heir of entail; *5to*, That neither Nathaniel nor Alexander ever expedie an infetment upon this adjudication, nor did any act tending to shew that they imputed their possession to this trifling adjudication for £808 Scots; *6to*, That the creditors did not so much as know that the adjudication in question had been conveyed to Nathaniel; *7mo*, That, during the long and complicated proceedings at law, with respect to the estate of Carleton, no one ever pretended that this adjudication could be set up to defeat the right of entail whereon the estate had been possessed. It was upon Fullerton’s adjudication, completed by charter and infetment, that Broughton originally pleaded; it was not till after Fullerton’s adjudication had been restricted to a security, that recourse was had to that neglected unpublished adjudication deduced by Martin. From this state of the facts, it appears that Nathaniel neither could set up, nor meant to set up the adjudication of Martin, as a title of property for the purpose of defeat-

ing the entail; nor can his creditors act contrary to his declared intentions or beyond his powers. Creditors-adjudgers have no pretence of *bona fides*. They take, and indeed must take, the right as it stands in the person of their debtor. The argument which the defender rears up in consequence of the minute of sale so long departed from, is obviated by the consideration already mentioned, that the statute, 1685, has no respect to the case of personal rights; and this also will serve for answer to the decisions in the cases of *Dorrater*, *Cromarty*, and *Bachillon*. But, independent of this, the minute of sale, once derelinquished, cannot be now urged by the defender. Although the late Broughton threw the minute of sale into his adjudication in implement, yet he plainly omitted it in his charter; and this the present defender does himself confess: neither did he stop here, but he actually brought a process of ranking of the creditors, and of sale of the estate, upon this medium, that he himself was not the proprietor, but a creditor of the proprietor: and his proceedings in that process shew, that he had as little reliance upon the argument now drawn from the minute of sale, as upon the argument now drawn from Martin's adjudication. The whole of the question resolves into this, Whether shall an adjudication for £808, deduced upon a debt of the entailer's, and retired by the heir of entail, (in consequence of the entailer's purpose, and agreeably to the obligation of the heir of entail,) be set up as a paramount title of property in this estate, because the heir of entail took a conveyance which he never used, instead of taking a renunciation of the debt? There are few estates in Scotland, however strictly entailed, which are not subjected to some incumbrances. If an heir of entail, by taking conveyances to them, though neither completed by infeftment, nor made the title of possession, shall be at liberty to set them up as sovereign rights of property, and thereby defeat the settlements of estates, it will follow that the method of securing estates by entail may be disappointed and eluded at pleasure.

On the 23d June 1766, "The Lords declared the right of Sir Thomas Gordon, repelled the defences, and decerned."

Act. A. Lockhart. Alt. R. M'Queen. Reporter, Coalstoun.

OPINIONS.

AUCHINLECK. The entail of Carleton is only a personal right, and is not in favour of one *alioqui successurus*: it is therefore good against a creditor who can pretend no *bona fides*. The only difficulty is from the adjudication, which is said to import an ample right of property independent of the entail. Suppose that this adjudication were still in the person of Martin, could he say, "I will carry off the estate upon my adjudication for £808 Scots?" The present case is still stronger. When Nathaniel purchased, the entailer had laid his heirs under an obligation to clear the debt. Nathaniel could not have purchased the adjudication so as to rear it up as a title of property, to the subversion of the entail. His creditors cannot do what he himself could not: any objection competent against him, is also competent against them.

PITFOUR. The entail did not appear on any record for 50 years. Two registrations are necessary to render effectual an entail against creditors. An

entail not on record is no entail; Nathaniel was obliged by the entail, but his creditors were not. Here the heir had, in his person, title both real and personal. Fullerton's adjudication has indeed been restricted to a security, but it was a right apparently good, and the legal was expired: this sufficient for creditors. It is true that the debt in Martin's adjudication is small, but the diligence is unexceptionable; and it has been observed, that the sums of all the adjudications put together were sufficient to equal the price of the estate; and, so standing the fact, the decision, *Murray of Clendon*, precisely meets the present case.

COALSTOUN. The question is, How far the limitations, here, are effectual against purchasers? In order to make an entail effectual, the Act 1685 requires the two publications mentioned in the argument. The words of the Act are general; no distinction is made between rights real and personal. A distinction, however, has been established, and so it was determined in the case of *Westshiel*. Hence, if I purchase from one having a personal right, I purchase with the burdens contained in that right. Upon the same principle, the Court ought to have supported entails engrossed in the investitures, though not recorded; for, in both cases, the purchaser sees the burden *in gremio* of his right from whom he purchases; but at no rate does the case of *Westshiel* apply to the present case. *There*, there was but one title; *here*, two: not only the entail, but also the adjudications. The case of *The Creditors of Kelhead* applies invincibly to this case. *There*, a simple right of apparency was held sufficient.

BARJARG. The right of the purchaser depends upon that of Nathaniel, and his again upon the entail.

AUCHINLECK. There was a qualified right in Nathaniel, latent, as well as the adjudications.

KAIMES. Nathaniel was bound to have sopited the adjudication, or, at least, to have conveyed with the same burden.

JUSTICE-CLERK. The opinion in favour of the pursuer is perfectly agreeable to the principles in the case of *Spalding*, as determined in the last resort.

PRESIDENT. The adjudication deduced by Fullarton of Dreghorn is out of the question. The case of *Murray of Clarden* was strait. I cannot suffer an adjudication for £808 Scots, with an expired legal, to carry off an estate of how great value soever. It is asked, How can this latent entail affect the right of the defender, a creditor, or purchaser? It is answered, that an entail is a right with limitations; when one acquires from him who possesses upon a personal right with limitations, he acquires under those limitations. In the case of *Kelhead*, there was an apparent heir who had been three years in possession, and there was no iniquity there, because these were *aliunde* fair debts by adjudication, to the extent of sixteen years' purchase.

For Sir Thomas Gordon,—President, Justice-Clerk, Auchinleck, Barjarg, Elliock, Kaimes, Kennet, Hailes,—8.

For Mr Murray,—Pitfour, Coalstoun, Stonefield,—3.

Non liquet. Strichen, Gardenstoun,—2.

Absent.—Alemore, Milton,—2.

LORD HAILES.

1766. *June 27.* JAMES CAMPBELL of Ardkinlas, *Charger,—against* JAM. M'CLAREN, Tenant in Camletter, *Suspender.*

STYLE, OLD and NEW.

Construction of the Calendar Act, in a question as to the Term of Removing, under Tack entered into before the alteration of the Style.

In 1742, Ardkinlas's author granted to M'Laren's author a lease of the land of Camletter for 24 years; the entry to the houses and grass, was Whitsunday 1742,—to the arable lands, Martinmas 1742. In 1765, Ardkinlas executed summons of removing against M'Claren, libelling on the Act of Sederunt, and concluding that he should be decreed to remove from the house and grass : Whitsunday 1766; and from the arable land at Martinmas 1766. The Sheriff of Argyle pronounced decret in terms of the libel. On the 20th May 1766 M'Claren was charged to remove, "conform to the Sheriff's decret, in all points." He applied for a suspension and sist, but, in the mean time, he was ejected 27th May 1766. In the suspension he pleaded, that the decret of removing was void, as decerning him to remove before the expiry of his lease. The lease was entered into previous to the alteration of the style by the Calendar Act: that Act declares, that the change of style shall not accelerate any term whatever, and particularly that of surrendering up the possession of land or hereditaments. Were the suspender to remove at Whitsunday 1766, he would lose the possession of eleven days: the Sheriff, therefore, ought to have decerned the suspender to remove on the 26th May, not at Whitsunday, which is now the 15th May; for, in every writing, since the alteration of the style, where Whitsunday is mentioned, the 15th May is understood, and must in the nature of the thing be understood.

The charger ANSWERED,—That the decret of the Sheriff did not accelerate the term of removing: it mentions no special days, it only ordains him in general to remove at Whitsunday: this must be interpreted of what was Whitsunday at the commencement of the tack, that is, Whitsunday old style. The Act 1690, c. 39, appoints that, in all time coming, "The summer term shall be the 15th May." In the Calendar Act, distinction is made between leases entered into before and after the alteration of the style: in the latter, the nominal 15th May is held to be the legal term of removing; in the former, as the term of removing is not accelerated, the nominal 26th May is the legal term. The meaning therefore of the Sheriff's decret is, that the suspender remove on the 26th of May, being Whitsunday, according to the construction here mentioned. And, in point of fact, it will be particularly observed, that the suspender continued in possession till after Whitsunday old style, and was not ejected until the 27th May; so that all parties understood the term of Whitsunday, mentioned in the decret, to be the 26th, not the 15th May.

On the 11th June 1766, the Lord Stonefield, Ordinary, refused the bill of suspension.

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On the 27th June 1766, "The Lords adhered," upon advising a reclaiming petition and answers.

Act. Ilay Campbell. *Alt.* J. M'Claurin.

OPINIONS.

The court was unanimous in its judgment, upon the fact that *nihil defuit* to the suspender, who possessed for the whole 24 years, and was not ejected till after Whitsunday old style. The argument that Whitsunday in the decret meant the 26th May, was not considered as satisfactory. Judgment went upon the fact.

1766. *June 27.* MARGARET BURNET, Spouse of Alexander Bannerman, Merchant in Aberdeen, *against* MARJORY BURNET, Widow of George Forbes, jun. Merchant in Aberdeen.

TESTAMENT.

Construction, in case of an Error in the Narrative of a Codicil.

ON the 1st September, Dr James Burnet, physician in Aberdeen, executed a testament, whereby he appointed his brother, Mr Andrew Burnet, writer to the signet, his executor and universal legatary. He burdened him with different provisions in favour of his sister Marjory Burnet, and his niece Margaret Burnet, and their children. The import of those provisions was as follows:— "To Marjory Burnet, my sister, in liferent, for her liferent use allenary, the sum of L.600 sterling, the fee of L.400 whereof I appoint for John and Margaret Forbeses, her children, equally betwixt them, &c. ; and the other remaining sum of L.200 I destinate and appoint to Anna Bannerman, daughter to Alexander Bannerman, merchant in Aberdeen, and, failing of her by decease, to Margaret Burnet, her mother, (the testator's niece ;) and the principal sum is to be settled and secured to the said Marjory Burnet in liferent, and to the said John and Margaret Forbeses, her children, and Anna Bannerman, conform to their said proportions in fee, in terms of the above appointment, at the sight, and by Thomas Burnet of Kirkhill, and Andrew Burnet," &c. On the 7th April 1768, Dr Burnet, being at the point of death, executed a codicil to his testament, of the following import:—"Whereas, by my latter will, dated the 1st September 1754, I did name Andrew Burnet my executor, with the burden of L.400 sterling, to be liferented by Marjory Burnet, and the fee thereof to be divided after her death betwixt John and Margaret Forbeses ; and with the further burden of L.200 sterling to be liferented by Margaret Burnet, and the fee to Anne Bannerman ; and being now resolved to add to these provisions, I do hereby burden the said Andrew Burnet with the sum of L.200 sterling in liferent to Marjory Burnet, and the fee to John and Margaret For-

beses, in fee equally between them ; and with the further sum of L.200 sterling in liferent to the said Margaret Burnet, and the fee to Charles Bannerman." He further declared this codicil to have the effect of a latter will, and to be part of that which he had formerly made. From this recital, it appears that, by the narrative of the codicil, Dr Burnet mentions his having left the liferent of L.400 only to Marjory, and the liferent of L.200 to Margaret ; whereas, in truth, he had left by his testament the liferent of the whole L.600 to Marjory, and only an eventual fee of L.200 to Margaret. Hence, a controversy arose between his sister and his niece. His niece claimed the liferent of L.200 by the narrative of the codicil, and of L.200 by the codicil itself. His sister claimed the liferent of L.600 by the testament, and of L.200 by the codicil. For determining this controversy, Andrew Burnet, the executor, raised a multiplepinding.

ARGUMENT FOR MARGARET BURNET, THE NIECE :—

The testament was executed in September 1754, nine years before the codicil. It was not strange that both the dying man and the writer should have forgotten its precise contents ; but this mistake in the narrative of the codicil will not disappoint the plain will of the testator : it is sufficient if his last will was to have the money liferented in the manner described by the codicil. A false narrative in a deed, which a man cannot alter, is of no consequence ; but where a man has it in his power to alter or make a new settlement, the false narrative has the same effect as if it had been truly contained in the former deed. Thus, if one should say in his codicil, "Whereas, by my will I have legated L.100 to John, I give him, by this codicil, L.100 more," it is certain that John would be entitled to L.200, although nothing had been legated to him by the will ; for that the intention of the testator is clear that John should have L.200 ; and it matters not whether that sum was given him by the will or by the codicil. Thus, if one should say, "Whereas, I gave to John L.400 by my testament, I now give him an addition of L.200 more ;" if it should happen that John had got L.600 by the will, he would get no addition by the codicil ; for that the addition was only given upon the supposition that he had already got no more than L.400. In the present case, Dr Burnet took nothing from his sister and her children by the codicil, which he had given them by the will. The liferent of L.600 is still reserved to the sister, and her children get an additional legacy of L.200. Besides, it will be remarked that the codicil contains a more rational destination than the testament did ; for, by the codicil, Dr Burnet separates the interests of Marjory and Margaret Burnet and their respective children, and makes each of the two liferent the portion given to children ; whereas, by the testament, Marjory Burnet was to liferent not only the portion of her own children, but the portion of Margaret Burnet's child.

ARGUMENT FOR MARJORY BURNET :—

It is plain that Dr Burnet did not mean, by the codicil, to revoke a testament executed nine years before, whereof he did not so much as recollect the contents. His having forgot the precise tenor of the will, can never prove his intention to revoke it in whole or in part. The question then is, Whether can Marjory Burnet claim the additional liferent of L.200 provided to her by the codicil, because the narrative of that codicil mentions erroneously that L.400, not L.600, had been provided to her in liferent by the codicil. Narratives of deeds are generally little regarded in law : It was thought proper in the codicil

to recite the tenor of the testament ; and, the testament not being at hand, its tenor has been misrepresented. By the Roman law, it was an established maxim, that an error in the narrative of a legacy did not invalidate the legacy itself : —sec. 31, Inst. *De Legatis*. This maxim is well expressed by Papinian, l. 72, ff. *Cond. et Demon*. “ *Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret* :” He who grants a legacy may have many reasons for granting it besides the reasons expressed ; and, therefore, the error in the cause expressed does not prove that the testator meant to grant the legacy only in case that cause should be true. Thus, Dr Burnet might have intended to give his sister the liferent of L.200 by his codicil, although he set forth that he had granted her the liferent of L.400 by his testament, and not the liferent of L.600. As to the observation, that the codicil, as explained by Margaret Burnet, is more rational than as explained by Marjory Burnet ; it is answered, that, when words are express, and imply nothing illegal or absurd, the words of the testator must be the rule of interpretation ; otherwise a settlement may be made by the Court, more rational perhaps, but still not the settlement of the testator. If Dr Burnet, by his testament, appointed Marjory to liferent the provision of Margaret’s child, he might carry on the same plan by his codicil ; and, if the testament, so conceived, must by itself be held rational, a codicil conceived in like manner cannot be held irrational.

On the 12th February 1766, the Lord Auchinleck, Ordinary, found, “ That Marjory Burnet, by the testament, is provided in the liferent of L.600, the fee of L.400 thereof being to go to her own children, and the fee of the remaining L.200 to Margaret Burnet’s children. Finds that, by the codicil, on the recital, that by his testament he had left L.400 to his sister Marjory in liferent, and the fee of that sum to her children, and that he had left L.200 to his niece Margaret Burnet in liferent, and the fee of that sum to her children, and that he was resolved to add to these provisions, and therefore burdens his executors with L.200 more to Marjory in liferent, and the fee thereof to her children, and with the further sum of L.200 to Margaret Burnet in liferent, and the fee thereof to her children ; Finds, that Marjory Burnet is not entitled to the liferent of L.200 over and above the L.600, but is only entitled to the liferent of L.600 in all ; it appearing, from the codicil, that it was the testator’s will only to add L.200 to her fund in liferent, on the supposal that she was formerly provided to the liferent of L.400 only ; but finds, that her children are entitled to the fee of L.600 ; and finds there is sufficient evidence, from the codicil, that it was the testator’s intendment that Margaret Burnet, his niece, should have the liferent, and her children the fee, of L.400 ; and finds the competitors entitled in these terms, and decerns against the raiser of the multiplepinding accordingly.”

On 5th March 1766, the Lord Ordinary, upon advising representation and answers, adhered.

On the 27th June 1766, the Lords, upon advising petition and answers, “ adhered to the interlocutor of the Lord Ordinary.”

For Marjory Burnet, R. Blair. *At*. J. Burnet.

LORD HAILES.

OPINIONS.

COALSTON. The will of the testator ought to be the rule ; and his will appears from the narrative of the codicil.

Affirmed upon appeal.

1766. *June 27.* JOHN MONTGOMERY, Merchant in Newry, Ireland, and the Executors of Thomas Atkinson, Merchant in Newry, Chargers, *again* CAPTAIN COLIN CAMPBELL, Commander of the Prince of Wales revenue sloop, suspender.

JURISDICTION—STATUTE.

1st, An unlawful seizure made at sea does not vest the admiral with a privative jurisdiction
2do, Construction of the Act 1672, c. 3, and 1686, c. 14, as to the Importation of Irish Victual.

[*Faculty Collection, IV. 7 ; Dictionary, 7359.*]

IN July 1761, John Montgomery and Thomas Atkinson loaded two ships with oatmeal, and took out their clearances at the custom-house of Newry, for North Faro, in Norway. While the two vessels were in the Sound of Mull, they were seized by Captain Campbell, an officer of the revenue, under pretence of their coming under the description of the statutes prohibiting the importation of Irish victual into Scotland. Various circumstances concurred to show that the clearance for North Faro was merely a cover, and that the voyage was intended for the north-west islands of Scotland. On the 1st September 1761, the vessels having been carried to Fort-William, were unrigged, and their cargoes unloaded by the authority of Captain Campbell. Captain Campbell made an application to the Sheriff-substitute of Argyleshire, residing at Fort-William, setting forth that, by various Acts of Parliament, the importation of victual from Ireland into Scotland is prohibited under certain penalties, besides forfeiture of the vessel and bottom : that, by the said Acts, such victual, waterborne betwixt Loch Ryan and the Head of Kintyre, or the Head of the Western Isles, is deemed an importation ; and, subsuming that the foresaid vessels were seized in those circumstances, carried by him to Fort-William, and their cargoes unloaded ; and therefore praying the Sheriff to condemn the meal and the vessels as a legal seizure, and to inflict the other penalties directed by law. The shipmasters were examined, the depositions of witnesses were taken, parties were heard. On the 13th October 1761, the Sheriff pronounced the following interlocutor : “ In regard it did not appear that the defenders had broke bulk since their cargoes were loaded in the port of Newry, and it has been fully proven that the Sound of Mull was the common and safe passage for vessels trading from the southward to the northward, assoiliyied the defenders, or ordains their cargoes and vessels to be delivered back to them ; the defenders being always obliged, before load-

ing their cargoes of meal, to grant hovering bonds, that they should regularly proceed on their voyages, and land their said cargoes of meal in and at some foreign port or ports, under the penalty of treble the value of their respective cargoes."

Upon pronouncing this judgment, Captain Campbell's agent entered what he termed an appeal to the Court of Session. The masters of the vessels, who had no concern with the cargoes, immediately, upon getting possession of their vessels, returned to Ireland, leaving the meal in the warehouses where Captain Campbell had lodged them. The proprietors of the meal pretend that they could not at that season of the year get vessels for transporting the meal to Faro, in Norway. Certain, however, it is, that the meal continued in the warehouses. On the 4th January 1762, the officers of the customs at Fort-William required the agent for Montgomery and Atkinson to receive the meal within twenty days, and to grant hovering bonds, in terms of the statute 5th Geo. II. ; declaring, moreover, that, if he failed therein, they would of new seize and carry the meal into condemnation. The agent answered, that the interlocutor of the Sheriff limited no time for the granting of hovering bonds,—that it was impossible to receive directions from the Irish merchants within so short a space as twenty days, and that at no rate could a vessel be procured at that season of the year for transporting the meal. On the 16th January 1762, the same agent required Captain Campbell to pay the price of the meal and the damages, in respect that, through his fault, Messrs Montgomery and Atkinson had lost their market. On the 5th February 1762, an embargo was laid upon all shipping outward-bound with provisions; and this embargo remained in force for seven or eight months, whereby the exportation of the meal became impracticable. In April 1762, during the currency of the embargo, the collector, formerly the Sheriff who pronounced the decret of absolvitor, and the controller of the customs at Fort-William, again made a seizure of the meal, and prayed the Sheriff to condemn it as not regularly exported, in terms of the former judgment: they also craved a warrant for exposing it to public sale on their account as seizure-makers. Although the agent for the Irish merchants represented that the embargo did at present render the exportation impracticable, and that he was willing to export as soon as the embargo was taken off, yet the sheriff, on the 23d June 1762, ordered the meal to be publicly sold, and the price to be lodged with the collector at Fort-William, upon his finding security to be answerable to whoever should be found to have right thereto. The meal and the bags were accordingly roused, and sold at L.133:19:1. sterling, a price said to be much below prime cost. For reparation of the damages which they had sustained, Messrs Montgomery and Atkinson insisted in an action against Captain Campbell before the Court of Session.

After a very cursory defence, if any,—The Lord Strichen, Ordinary, on the 24th July 1763, pronounced decret in terms of the libel. Captain Campbell, being charged on this decret, offered suspension. He declined entering into the merits of the question, but pleaded that the present cause was maritime, wherein the admiral has a privative jurisdiction by the statute 1681; and therefore that the Court of Session was not a competent court, and its decree void.

On the 8th February 1765, the Lords pronounced the following interlocutor: "On the report of the Lord Auchinleck, the Lords repel the objection to the

jurisdiction of the Court, and remit to the Lord Ordinary to proceed accordingly."

On the 6th July 1765, the Lord Auchinleck, Ordinary,—“ Found the seizure of the charger's meal was illegal, and that therefore the suspender is liable to make up to the chargers the damages arising from his illegal proceedings, viz. the prime cost of the meal in Ireland, the freight which the chargers paid, the interest upon both, with the expense of process, and appoints the suspender to give in his objections to the charger's claims for these several articles, within eight days, it being always understood that the chargers are to give up any claim to the price at which the corn was sold by the sheriff, and also to give up and assign to the suspender all claims against the collector and others, on account of this meal, with warrandice from fact and deed.”

But, upon advising a representation, the Lord Ordinary took the cause to report.

The suspender endeavoured to show that the clearance to Faro was merely a cover; that no such voyage was intended, and that the destination of the vessels was to the Western Isles. The chargers, on the contrary, endeavoured to show that there was no purpose of landing the meal in Scotland, and that they had not transgressed, nor meant to transgress the law. The arguments, in point of law, were not pleaded from the bar by either of the parties according to the ideas of the bench, and therefore it would be superfluous to recite them.

On the 27th June 1766,—“ The Lords, in respect of the Scots statutes respecting the importation of Irish victual, adhered” to the first interlocutor of the Lord Ordinary.

Act. J. Burnet. Alt. J. Montgomery. Reporter, Auchinleck.

OPINIONS.

JUSTICE CLERK. Where a statute prohibits the importation of goods, and evidence is brought of an intention to land, though bulk be not broke, this is importation in the construction of law. But this case is to be determined upon the Act 1672, c. 3, not upon British statutes. If the last part of the Act, 1672, be considered as abolished, many unjustifiable depredations have been committed by custom-house officers; and, if the circumstances in this case are not sufficient to authorise a seizure, the law will be eluded. The Act, 1686, c. 14, is explanatory of the Act 1672: it says that the meal shall be sunk,—which implies its being on board. The Act, 1672, speaks of vessels being seized.—How seize the vessel and let the meal go? This implies that the meal is understood to be on board. All the circumstances of the case show that an importation into Scotland was intended. The custom-house officer acted *bona fide*.

ALEMORE. If the custom-house officer had deviated a little from the law, while actually employed in executing the law, he might have been excused; but here he was acting without any law at all. By virtue of the Articles of Union, the laws as to Irish victual remain in force. The vessels must be taken in the act of landing. In those days, before the Union, there was no idea of importation without landing. Hence the Act, 1686, imposes a sort of delinquency on the vessel for three years. This meal was not seizable even by the

Act 1762; for Campbell, the custom-house officer, had no authority from the Privy Council.

KAIMES. The powers given to the Privy Council are now at an end. The custom-house officer was not bound to act; he therefore acted at his peril.

KENNET. The Scottish statutes imply an actual importation, and therefore the custom-house officer did wrong, and must pay damages.

PITFOUR. The former part of the Act, 1672, requires actual importation. The after part may go farther, though that is doubtful: but this is of no consequence in the present question, for the extraordinary powers committed to the Privy Council are not now executable: it would be dangerous to find the contrary. The powers formerly vested in the Privy Council, with respect to Jesuits, are, by an Act, *ultimo Annæ*, granted to the Court of Justiciary in place of the Privy Council,—upon this narrative, that the Privy Council has ceased.

COALSTON. The statutes relate to victual actually landed. If the law may be eluded in consequence of this interpretation, the Legislature, not the Judges, must provide the remedy.

PRESIDENT. Meal may be seized by any one: the Act, 1672, gives a share of the seizure to the discoverer: if one lays his boat to shore, this is importing into the country or port of Scotland; but this did not happen in the present case, and the Court cannot extend the words of a revenue law, in order to make it more beneficial to the revenue.

Diss. Justice-Clerk.

See Books of Adjournal 14th June 1672, advocate, Mr Archibald Beath, with the pleadings of Sir John Nisbet, and Sir Geo. Lockhart, therein engrossed; and M'Kenzie's Criminals, title *Murder*, § 18.

1766. *July 3.* AGNES TENNENT, Spouse to Mr Andrew Chatto, Minister of the Gospel at Morebattle, and her Husband, for his interest, *against* Mr WILLIAM BAILLIE, Advocate.

SUCCESSION.

Interpretation of the word "Heirs" in a Settlement.

[*Faculty Collection*, IV. 66; *Dictionary*, 14,941.]

THE competition between Agnes Tennent and William Baillie was concerning the succession to the estate of Stonnipath, in consequence of a settlement made by Mr William Walker, the proprietor. For understanding the nature of this competition, the following genealogical tree is necessary:—

Mr Alexander Walker
of Stonnipath.

Mr William Walker,
sans issue, 1759.

1. John Tennent.

Alexander.

Isobel Walker,

Agnes,
Claimant.

2. Mr J. Baillie,

William,
Claimant.

On the 7th May 1752, Mr William Walker executed a settlement of his estate of Stonnipath and others. Its narrative bears, "For the love, favour, and affection I have and bear to my sister [Isobel Walker,] and her children, after named, upon whom I am resolved to settle my real estate, and to prefer them thereto, next after the issue of my own body, in the order of succession, and in the terms, and under the conditions underwritten." The dispositive clause bears, "to myself in liferent, and to the heirs-male of my body; whom failing, to the heirs-female of my body, in fee; whom failing, to Isobel Walker, my sister, in liferent use allennarly, in case she shall happen to survive me; and, after her decease, to Alexander Tennent, eldest lawful son of my said sister, and procreate betwixt her and the deceased John Tennent, and his heirs or assignees, in fee; whom failing, to William Baillie, eldest lawful son to the said Thomas Baillie, procreate betwixt him and my said sister, his heirs or assignees, also in fee; whom all failing, to my own nearest and lawful heirs and assignees whatsoever." He then mentions the particular lands disposed, and binds himself and his heirs whatsoever to infest himself, &c., and to resign and surrender, for new infeftment, to the same series of heirs, and in the same order as above mentioned. He next takes the heirs-male or female of his own body; whom failing, his sister and his other heirs of provision above mentioned, bound to pay his debts and fulfil his deeds. He farther reserves to himself full power of altering or revoking this deed, "notwithstanding of the substitution and destination of succession above written," and that without consent of his sister "or her sons above named, or their foresaids, or any of them." The expression, "her sons, above named, and their foresaids," occurs four other times in this deed.

On the 7th May 1752, Mr Walker also executed another deed, being a disposition of moveables, in favour of Isobel Walker his sister. It proceeds upon this narrative:—"Having, by a deed of this date, settled my real estate, failing issue of my own body, upon Isobel Walker, my sister, and her children therein named, in liferent and fee, in manner at length therein set furth." On the same 7th May 1752, Mr Walker executed a bond of provision for £500 sterling, in favour of Agnes Tennent, his niece. The obligation to pay is thus conceived:—"I bind and oblige me and my heirs, as well male as of line, tailie, conquest, and provision, and all other my heirs, executors, and successors whatsoever, renouncing the benefit of the order of discussion." Mr Walker died in 1759, without issue, whereby the succession to his estate, under the deed 1752, opened to Alexander Tennent, the eldest son of Isobel Walker; bnt, as Isobel Walker had right to the liferent, Alexander Tennent never entered into possession, neither did he make up titles to Mr Walker. He

also died, in 1763, without issue. Upon his death, Agnes Tennent, his sister of full blood, and Mr William Baillie, his brother uterine, took out brieves to be served heirs of provision in the deed 1752: the Lords Auchinleck and Bارج were appointed assessors to the service before the macers: they heard parties, and took the debate to report.

The competition between the two claimants resolved into this:—Agnes Tennent claimed the estate as being heir of Alexander Tennent, to whom, and his heirs or assignees, Mr Walker had disposed it. Mr Baillie claimed the estate as called *nominatim*, failing Alexander Tennent and his heirs or assignees: and he pleaded, that the term *assignees* was a superfluous word of style, and that the term *heirs*, in this particular case, must be limited to the heirs of the body of Alexander Tennent; and, such heirs having failed, he, the claimant, was entitled to be served in virtue of the *nominatim* substitution.

ARGUMENT FOR AGNES TENNENT:—

Alexander Tennent, the son of Mr Walker's sister, by the first marriage, was the *persona prædilecta* in this settlement: Mr Baillie, the son of the second marriage, is only called, failing Alexander Tennent and his heirs. Agnes Tennent is his heir; for he left neither children nor brothers-german, and Agnes Tennent is his only sister-german. If the meaning of the word *heir* be not ascertained in the law of Scotland, it does not appear that there is any word in that law whereof the meaning is ascertained. When there was a former settlement, it has been questioned whether the word *heir* in a latter settlement meant the heir of that settlement or the heir-at-law: but, when there was no former settlement, it has never been disputed that *heir* in a deed meant heir-at-law. Were this to be controverted, then it would follow that there is no legal order of succession established by the law of Scotland. But farther, the testator, for removing all possible ambiguity, has, to the term *heirs*, added the term *assignees*: If the estate was given to Alexander Tennent, his heirs or assignees, how can it be disputed that the estate was given to be at his absolute disposal, and to his heirs at large. No instance can be shown where those words were ever used in such a limited sense as that for which Mr Baillie contends. From other clauses in the same deed, it is evident that the testator understood the words in their full latitude, for that he uses the same words in substituting Mr Baillie, his heirs, or assignees, after which follows the last clause of substitution to the testator's own heirs and assignees whatsoever: Now it is plain that he meant to call the whole of the heirs of Mr Baillie preferably to his own heirs at large, whom he only calls in the last place, with the view of excluding the Crown as *ultimus hæres*. If those words, Mr Baillie's heirs or assignees, comprehend his whole, the very same words, Alexander Tennent's heirs or assignees, cannot be limited to the heirs of his body. It would be most irrational if the same words in the prior substitution of the *persona prædilecta* should receive a more limited construction than they do in the posterior substitution of the person less favoured. That the testator was aware of the difference between heirs and heirs of the body is evident from that clause wherein he calls the heirs-male or female of his own body: Had he meant to call the heirs of Alexander Tennent's body, and no others, he would have repeated the words used in the former clause, instead of varying them.

Thus Mr Baillie's interpretation of the deed is liable to two insuperable objections :—*first*, He makes the same words, *heirs or assignees*, to mean one thing in Alexander Tennent's substitution, another thing in his own substitution. *Secondly*, He makes different words, *heirs-male or female of the body* in the first clause, and *heirs simpliciter* in the second, to mean the same thing. If, in a deed, the same words may mean different things, and different words the same thing, there remains no certainty whatever in the interpretation of words. In order to obviate the objection that Mr Baillie makes,—the same words mean different things,—he has ventured to maintain that heirs and assignees, in the clause substituting him, does imply heirs of his body. According to this interpretation, if Mr Baillie should succeed, and die without heirs of his body, the heirs-general of the testator, not the younger brother, and Mr Baillie, would be called to the succession. How the testator should thus have preferred the eldest, but not the younger, sons of his sister to his own heirs-general, is hard to conceive. But this interpretation, however strained, removes no more than one objection : it does not remove the other objection, that Mr Baillie supposes the testator to have used heirs, and heirs-male or female, of the body, as synonymous terms. It is true that a settlement to A and his heirs-general, whom failing to B and his heirs-general, gives no more than a distant hope of succession to B, and those called after him : but this is no objection to the claim of Agnes Tennent, whose right is not by a tailie in the strict sense of the term, wherein clauses prohibitory, irritant, and resolute, are implied ; but by a tailie wherein nothing more is meant or done than to make a distinction of heirs in a certain series. It matters not that Agnes Tennent, though known to the testator, is not called *nominatim*, while Mr Baillie is : It cannot be pleaded that every one, known to the testator, must be called in special. Alexander Tennent and Mr Baillie were called *nominatim*, as the eldest son of each marriage : a further detail was unnecessary : besides, the testator may not have had in view every event, and may have supposed that his estate was to be enjoyed by Alexander Tennent and the heirs of his body, to the exclusion of collaterals. Although he did not foresee the event which has happened, of Alexander Tennent dying without issue, this will not make the technical term *heirs* less effectual to the heirs-general of Alexander than if they had been expressly and anxiously called by their names, in so far as known to the testator.

ARGUMENT FOR MR BAILLIE :—

The whole of the argument for Agnes Tennent, however diversified, resolves into a literal interpretation of the term *heirs*. The term *heirs* is capable, according to circumstances, of a larger or more limited interpretation. Whenever words, by being interpreted in one sense, produce absurdities in the construction of a deed, they must be interpreted in another sense, which may render the deed consistent, and be agreeable to the *voluntas testatoris*. Of this rule there are many examples in the Roman law : the celebrated judgment of Papinian, *l. 102, D. de Cond. et Demonstrat.* is well known,—others occur *l. 57, § 1. D. ad S. C. Trebel.*, and *l. 25, § 1. D. de Lib. et Post.* The general rule is thus laid down,—*l. 67, D. de Reg. Juris*, "*Quoties idem sermo duas sententias exprimat, ea notissimum accipiat quæ rei gerendæ aptior est.*" That the word heir is capable of an interpretation more extensive or more

limited, according to circumstances, cannot be disputed. The term heirs-whatsoever is in itself more definitive than that of heirs, and yet that term has been found, according to circumstances, to imply heir-male, heir of investiture, heirs of conquest, and even executor, rather than heir of line. This is well expressed by Lord Stair, *B. 3, Tit. 5, § 12*, where he says, "that the adequate signification of heirs-whatsoever is not heir-general, but heirs-generally." A remarkable example of this occurs in the Statute Book, Act 1685, concerning tailies, whereby it is declared, that the neglecting to insert the provisions irritant, &c. in the after investitures, shall import a contravention against the contravener "and his heirs, whereby the estate shall, *ipso facto*, devolve to the next heir of tailie." Here, heirs, it is acknowledged, must imply heirs of the body; for, otherwise, the person contravening would occasion the forfeiture of all the heirs of entail. Wherever there are various branches of substitution in a settlement, the term heirs must be understood of heirs of the body, until it comes to be used in the concluding clause. Thus, a settlement to an eldest son and his heirs, with substitutions, must be limited to heirs of the body; for, otherwise, the first branch of the substitution would comprehend all the rest, which is a contradiction. The reason of this is clearly seen from the following observation, arising from the present case:—Agnes Tennent stands in the same degree of relation to the testator that Mr Baillie stands; she is the daughter, he the son of Mr Walker's sister. But as Agnes Tennent here claims as heir of line to Alexander Tennent, the same claim will be equally competent to all the heirs of line of Alexander Tennent, though standing in no degree of relation to the testator. Thus, the uncle, or other collateral of Alexander Tennent, would be as much his heir of line as Agnes his sister, and yet would be a person wholly extraneous with respect to the testator. The argument of Agnes Tennent does therefore resolve into this: that the testator, while establishing an order of succession among his own relations, did prefer strangers to his blood. Thus much in general; but more particularly, the purpose of the testator may be collected from various clauses in the deeds executed by him. The preamble of the settlement of the heritage in question, bears the *causa donandi* to be "love, favour, and affection to his sister and her children after named." He mentions his two nephews, Alexander Tennent and Mr Baillie; he does not mention his niece Agnes Tennent; yet, according to Agnes Tennent's argument, he prefers, to a nephew whom he named, not only a niece whom he had not named, but all the extraneous heirs of Alexander Tennent. It would have been ludicrous for the testator to have expressed his love, favour, and affection to his nephew Mr Baillie, by providing that the succession should not open to him till all the heirs of Alexander Tennent had failed. As the testator did, at the time of executing this settlement, execute a bond of provision in favour of Agnes Tennent for L.500 sterling, it is certain that he remembered her: if he had meant to prefer her to Mr Baillie, he would have inserted her in the substitution. Thus, again, in the settlement of his executry, the testator repeats the tenor of his settlement as to heritage, upon his sister, "and her children therein named." That the testator distinguishes between heirs and heirs-male or female of his body, and therefore shows that, by heirs, he meant heirs-of-line, is a criticism drawn from a small inaccuracy of the clause referred to by Agnes Tennent. Another inaccuracy occurs in a clause where he transfers his title-deeds from his heirs whatsoever "to the

heirs-male of his body in fee ; whom failing, his heirs-female." According to which, if taken in that strictness for which Agnes Tennent contends, he did, in the event of the heirs-male of his body being extinct, transfer his title-deeds from his heirs whatsoever to his heirs whatsoever. The inaccuracy of particular clauses cannot have the effect of overturning the whole general purposes of the testator's settlement.

The question in controversy between the parties is determined by an express text of the civil law, l. 17, § 8. *D. ad S. C. Trebel.*, "*Si quis ita fideicommissum reliquerit, fidei tuæ, fili, committo, ut si sine hærede moriaris, restituas Seio hæreditatem, videri eum de liberis sensisse, Divus Pius rescripit, et ideo cum quidem sine liberis decederet, avunculum ab intestato bonorum possessorem habens, extitisse conditionem fideicommissi rescripit.*" It is true that the text in the civil law is printed thus,—"*si alieno hærede moriaris*" instead of "*si sine hærede moriaris*,"—but for *alieno* the glossators read *sine*, and this alteration is approved of by the elder Gothofred *ad loc.* Of the same opinion is Bartolus, *ad loc.*, and he gives this reason—that, in testamentary settlements, the *conditio fideicommissi* must be such as may or may not take place ; that the *conditio si sine hærede*, in the more comprehensive sense of the word *hæres*, is an event so rare as scarcely to be possible, and therefore that the condition must be understood in the more limited sense of the word, *sine hærede de corpore suo*. To the same purpose speak *P. de Castro. ad L. 29. D. de Lib. et Post.* ; *Alex. Tartagno, lib. 5, concil. 125* ; *Mantica, de Conjectur. Ult. Volunt. lib. 8, t. 14* ; *Wissenbachius, ad tit. de Verb. Signif. l. 65*. The same rule of interpretation has been received in the law of England. *Peere Williams, vol. 1. folio 23, Trinity Term 1700, B. B. Nottingham against Jenkins*. The case, "J. S. had three sons, A, B, and C, and devised his lands to B, his second son, to hold to him and his heirs for ever, and for want of such heirs, then to his, the testator's right heirs." Chief Justice Holt said, "that the word *heirs* can import nothing more than issue ;" and it was determined accordingly ; and a like judgment was pronounced in the case of *Webb against Herring*, Cro. Jac. 415, Hilary Term, 13, Jac. I. And in the case, *Parker against Thacker*, Hil. 33, 34. Car. II. 3 Levin. 71. All those judgments proceeded upon this principle, that the term *heir*, however descriptive of heirs-general in the abstract, must, in settlements, be so limited as to follow the will of the testator. And that, in the present settlement, the testator did, by *heirs*, mean heirs of the body, is evident from the consistency of that interpretation with the nature of his settlement, and from the absurdities attending a contrary interpretation.

ADDITIONAL ARGUMENT FOR AGNES TENNENT :—

The authorities urged by Mr Baillie from the civil law, and the law of England, did not receive an answer in the original information for Agnes Tennent. She afterwards took an opportunity of making answers to them, and the substance of those answers is subjoined under the name of additional argument. She observed in general that the interpretations of Roman lawyers in fideicommissary substitutions are so loose and fanciful that they cannot be applied to the settlements of land estates by the law of Scotland ; that the Roman lawyers themselves used a greater latitude in the interpretation of fideicommissary than of direct substitutions. More particularly, she observed that the

DECISIONS REPORTED BY

passages quoted by Mr Baillie, from the civil law, do not apply to this case. In l. 101, *D. de Cond. et Demonstr.* is nothing to the purpose: It proves, however, so much against him, as it gives an example of a condition understood, though not expressed, in favour of the *persona prædilecta*, whereas Mr Baillie contends that words should be interpreted contrary to their natural signification, in prejudice of the *persona prædilecta*. The next authority, l. 57, § 1, *D. ad S. C. Trebel.* is as to an expression whereof the meaning was clear: the only question was, whether *uterque* implied *alter*, whether *both* comprehended either? This was determined in the affirmative, without doing any violence to the words. The question, l. 25, § 1, *D. de Lib. et Post.* is foreign to the purpose, as it turned upon this,—whether the testator knew, or did not know, that his daughter-in-law was delivered of a child. As to the capital authority, l. 17, § 8, *D. ad S. C. Trebel.*, Mr Baillie forces it into his service by a violent correction of *si alieno* into *si sine*. Were such corrections admitted, any law in upon the authority of the glossators, that is, upon an assemblage of the barbarous commentaries of Accursius: it is not acknowledged by the Florentine MS. nor by any one edition of the Pandects; neither has it been adopted by Cujacius, the later Gothofred, or any other of the *melioris notæ interpretes*. Supposing, then, the received to be the true reading, *si alieno*, the passage makes against Mr Baillie, not for him. It is plain that what made the Emperor suppose that the testator had children in view, was his using the word *alienus*; the emperor therefore decided, that, if the son died without children, the fideicommiss should take place; and this clearly supposes that, if the words had been simply *sine liberis*, the decision would have been different; and the uncle, being undoubtedly an heir, would have succeeded. In a word, the Emperor understood the settlement as if it had been upon the son and the heirs of his body, whom failing, to the fideicommissary; and this very properly, because the expression *alienus hæres*, not *hæres* simply, was used. N.B. This does not solve the difficulty; for, if the expression had been *si alieno hærede*, there could be no doubt of the determination of the Emperor, The *avunculus* was not *suius hæres*, and consequently was *alienus*; and it never could have been put as a question for the determination of the Emperor, whether an *avunculus* was *alienus hæres*. It is probable that *sine hærede* was in the text, which some transcriber explained to be *alieno hærede* as tantamount to *sine liberis*, and this explanation has crept into the text. The learned counsel who said that Cujacius could not be produced in support of Mr Baillie's interpretation, knew well that Cujacius was totally silent on the subject. With respect to the precedents from the English law, the counsel for Agnes Tennent confessed that he could not plead upon a law whereof he did not understand the terms; that he could only guess that, in those cases, the settlements were understood to be made upon A and his heirs; whom failing, upon B, who happened to be the nearest heir of A, failing the issue of A; so that, B being called next to A and his heirs, it was plain that, by the heirs of A, the heirs of his body were meant: but this is not the case here, for Mr Baillie, the substitute, is not the heir of Alexander Tennent. Had he been so, there would have arisen no controversy between the parties.

On the 20th June 1766, the Lords, upon report of Lord Barjarg, "found,

that the claimant, Mr Baillie, is preferable, and entitled to be served heir of provision to the deceased Mr William Walker under the settlement 1752,—and remitted to the macers to proceed in the service.”

On the 3d July they “adhered.”

For Mr Baillie, A. Lockhart. Alt. J. Burnet. Reporter, Barjarg.

OPINIONS.

The Court was unanimous. The word *heirs* was held to be pliable; the intention of the testator was clear: The only ambiguity arose from a country writer deviating from his style-book. An ingenious reclaiming petition was offered, but on the 3d July was refused without answers. Concerning it the President observed, that the petition took many things for granted, which he apprehended were contrary to the principles of the law of Scotland.

This decision, however, was reversed on appeal.

1766. July 4. The INCORPORATION of SHOEMAKERS in Edinburgh *against* WILLIAM MURRAY, Shoemaker in Edinburgh.

[*Kaimes' Select Decisions*, 320, *Dictionary*, 1962.]

BURGH-ROYAL.

It is lawful for a freeman to join stocks with an unfreeman.

THE incorporation of shoemakers in Edinburgh is an ancient incorporation. In 1586 they obtained a seal of cause from the magistrates and town council of Edinburgh. It proceeds upon the narrative, “that our sovereign Lord’s lieges are greatly skaithed and defrauded by unsufficient work of ignorant persons, labourers, both in black work and barked leather.” It orders, “that no freeman of the said craft, being burgess, pack or peel, can be partner with unfreemen, nor make conventions with them, under the pain of ten pounds, or tinsel of his freedom.” This seal of cause was confirmed in 1598 by a charter from King James VI. For the better enforcing thereof, each member at his admission makes oath “that he shall be leal and true in his craft and vocation in serving the lieges, and shall obey the deacon and masters for the time; shall defend the liberty of the craft, conform to equity and the uttermost of his power, and shall keep all the general statutes and ordinances made, or to be made, for utility and welfare of the craft, without revocation therefrom, and shall not colour nor fortify any unfreeman, nor pack and peel with them, &c. under the pain of perjury and defamation.”

In February 1764, William Murray was admitted a freeman of the incorporation of shoemakers in Edinburgh. In August 1764, he entered into an agreement with Alexander Learmonth, tanner in Edinburgh, no freeman of the incorporation of shoemakers. By this agreement it was provided that each of them should advance an equal sum of money to be employed in the trade of

tanning leather and making shoes : That the former branch should be conducted solely by Learmonth, and under his name ; the latter branch in like manner by Murray ; and that the profit and loss upon each branch should be divided equally between the partners. The incorporation of shoemakers considered this contract as inconsistent with Murray's duty and oath in quality of a freeman shoemaker : they threatened to bring a complaint against him before the magistrates of Edinburgh : upon this, Murray, with consent of Learmonth, cancelled the contract. Notwithstanding this, the deacon and treasurer of the shoemakers, with concurrence of the procurator-fiscal, brought a complaint against Murray before the magistrates of Edinburgh, accusing him of perjury, and of violation of the privileges of the incorporation, in so much as he had entered into copartnery with Learmonth, by which Learmonth, an unfreeman, was to receive part of the profit arising from shoes made by Murray, a freeman. This complaint concluded for L.100 sterling, in name of damages and expenses to the incorporation ; for a fine of L.100 sterling to the procurator-fiscal ; that Murray should be found to have forfeited his freedom, and that he should be otherwise punished, according to the demerit of his offence.

On the 25th June 1765, the magistrates "found that Murray, by the contract entered into by him with Learmonth, an unfreeman, did unlawfully communicate to him the benefit arising from the freedom of the incorporation ; but, before answer as to the consequences thereof, ordained the pursuers to condescend on what proof they offer to bring of the said contract having taken effect, and of the damages." Murray removed his cause into the Court of Session, by advocacy. On the 14th January 1766, the Lord Kennet, Ordinary, remitted the cause *simpliciter*. On the 18th February 1766, he adhered to this interlocutor : Murray prepared a reclaiming petition, to which answers were put in.

ARGUMENT FOR MURRAY THE DEFENDER :—

The inductive reason of the Seal of Cause 1586, is, that the lieges may not be imposed upon by ignorant workmen : this was obviated by the contract, for the management of the shoemaking branch of the business was committed solely to Murray, a freeman shoemaker. Neither have the exclusive privileges of the incorporation been violated ; for all the shoes were to be made by a freeman, and this is all that the incorporation can claim. It does not vary the case, that the profit and loss upon this trade were to be divided between the partners. The partners might have blocked out the shoes in Edinburgh, sent them out of Edinburgh to be sewed, and then brought them in again, and have sold them ready made ; or Learmonth might have bargained with Murray for half the shoes that he could make, and then have bargained with him to sell that half, and Murray's own half, at their joint risk. Such bargains would have been lawful, and there is no material difference between them and the bargain in controversy. Packing and peeling with unfreemen is a thing different from the present case. It means that abuse whereby an unfreeman is permitted to use the name of a freeman, and thereby carries on the business of the incorporation without being a member of it. The freeman who thus lends his name is said to pack and peel with unfreemen.

That this is the meaning of the expression, appears from the incorporation-oath, where the offence is described to be colouring or fortifying an unfreeman. That such must be the sense of those words is evident from this; that it is impossible to colour the work, or fortify the workman, where he is ignorant of the business, and never intends to practice it.

ARGUMENT FOR THE PURSUERS :—

The words of the seal of cause are most explicit, “shall not be partner with unfreemen, or make conventions with them.” The words of the oath are no less explicit, “shall not colour or fortify any unfreeman.” If those words have any meaning at all, they have this, that an unfreeman cannot be directly assumed as a partner in the trade of making and vending shoes within the liberties of the burgh; and that the words have been so understood, is evident from this, that no attempt, similar to the present one, was ever made by any freeman shoemaker. The present contract being plainly a convention with a partner who is an unfreeman, it is in vain to put imaginary cases where it is said a freeman might admit an unfreeman into a share of his profit or loss. Here, Murray, by communicating his profits and losses with Learmonth, communicates every privilege of the incorporation which he himself enjoys, [*N.B.* The communication of losses is not a privilege;] and by it Learmonth became as much a shoemaker as Murray, with this exception, that he had not the education of a shoemaker, [that is, he was a shoemaker in every thing but the making of shoes.] It is impossible that the seal of cause should prohibit a freeman from lending his name to an unfreeman who could make shoes, and yet allow him to lend his name to one who could not. The judgment of the magistrates, in this case, is agreeable to two judgments pronounced by the Court of Session, 18th February 1757, *Incorporation of Hammermen and Shoemakers in Glasgow* against *James Dunlop*,—Faculty Collection. Those decisions proceeded on the general nature of incorporations and the import of the words packing and peeling.

On the 4th July 1766, the Lords “advocated, and assoilyied.”

Act. D. Rae. Alt. T. Monro.

OPINIONS.

ALEMORE. The judgment of the Magistrates is erroneous, for the freeman carries on the business of shoemaking. This very question was determined for the defender in England, where a brewer associated a gentleman into his trade.

PITFOUR. The incorporation plan is monopoly, as they would hinder a man, however skilful, from working, unless of the company, so they would endeavour to hinder a freeman from getting credit.

COALSTON. Without credit, manufactures cannot be carried on, nor even incorporations themselves subsist. The words of the seal of cause are so wide, that, literally interpreted, they would be absurd. *Shall not make conventions*, does, in strictness of speech, exclude all intercourse or bargains between freemen and unfreemen.

KAIMES. The case of the incorporation of Glasgow, was *toto cælo* differ-

ent. There, an unfreeman was in effect the master ; here a freeman is master : and, as he cannot borrow money, he associates an unfreeman for profit and loss.

AUCHINLECK. The rational interpretation of the seal of cause is, that no conventions shall be made that are prejudicial to the incorporation ; but here the convention is not prejudicial to the incorporation, however it may affect the rich members who may carry on the business upon their own stocks, without foreign assistance.

HAILES. I do not think that King James VI., by his charter 1598, could authorise the Magistrates to try perjury without a jury. The seal of cause must be the rule, not the oath ; if the oath goes farther than the seal of cause, no action can lie upon it. I doubt whether the oath can be administered at all : we complain of the bad consequences arising from the multiplicity of oaths established by statute ; for them the land mourns ; and shall we authorise oaths conceived in terms vague and obscure, and imposed without authority of statute.

PRESIDENT. Such corporation oaths are established by custom : they have some sanction from a late judgment, *Douglas against The Magistrates of Musselburgh*. In the case of *Glasgow*, an unfreeman carried on the business under the name of a freeman ; but here the freeman acts in his own name, and takes the benefit of an unfreeman's money. Unfreeman, in the seal of cause, and in the corporation oath, is an unfreeman of the same trade.

1766. July. MR JAMES REID, Minister of the Gospel at Beith, *against* The HERITORS of that Parish.

STIPEND.

Minimum of a Stipend.

THE parish of Beith is between two and three miles long, and as many broad : the minister's house and church are central : the number of persons in the parish is 800, so that there may be about 300 examinable. The parish is situated in Fife, upon the high-road, at about equal distance from the North Ferry and Kinross. In 1650, the Commissioners for Plantation of Kirks modified to the minister of Beith the following stipend :—3 chalders oats, 1 chaldar bear, 500 merks in money, and 40 merks for communion elements. There is a sum mortified to the minister of this parish, being 1400 merks, whereof he ought to receive the interest.

In 1764, Mr Reid pursued the heritors for an augmentation.

On the 5th March 1766, " The Lords Commissioners modified the constant stipend to be one chaldar of bear, and L.633 : 6 : 8 Scots for stipend, with L.40 money, foresaid, for communion elements, by and attour the interest of 1400 merks mortified to the minister of this parish."

On the 4th July 1766, the Lords, after advising a reclaiming petition for the minister, and answers for the heritors, “adhered.”

Act. D. Dalrymple. *Alt.* A. Rolland.

OPINIONS.

COALSTON. I hold that the *minimum* established by law, is eight chalders, or an equivalent in money; so that, in places where the grain is worth L.100 Scots per chalder, as in the neighbourhood of Beith, the minister must have eight chalders, or L.800 Scots; and as this minister has not L.800 Scots, he has not the *minimum*.

AUCHINLECK. This cannot be the construction of the law; for, had L.800 been the *minimum*, no minister would ever have acquiesced in the *minimum* as generally understood of 800 merks.

1766. July 11. WILLIAM BRACK, only Son of William Brack, Portioner of Smallholme, *against* ISOBEL HUTCHINSON and WILLIAM PRINGLE in Easterhead, her Husband.

DEBTOR AND CREDITOR.

A debt being due by a Minor, (who had succeeded to an estate under a destination, burdened with that debt,) and his father, as his administrator-in-law, offering to pay the debt; *found*, That the Father was entitled to demand an assignation from the Creditor.

On the 30th December 1741, William Hutchinson executed a settlement of certain lands in Smallholme, in favour of himself and his wife, Isobel Lamb, in liferent, and to the heirs-male of his body in fee; whom failing, to his eldest daughter, Agnes Hutchinson, and the heirs-male of her body, and the heirs-male of that heir-male's body; whom failing, to certain other substitutes. By this disposition it was provided, that, immediately after the decease of William Hutchinson and his wife, the heirs-male of his body then succeeding, if that should happen, should be personally bound for, and the fee of the lands affected with payment of 500 merks to each of his four daughters: and in case there should be no heir-male of his body, then the substitute on whom the estate should devolve was also declared personally liable, and the fee of the lands burdened with 500 merks to each of the four daughters, excepting her who, or the heirs of her body, should succeed. By the death of William Hutchinson, without heirs-male of his body, and by the death of Isobel his wife, and Agnes his eldest daughter, the succession devolved upon William Brack, the eldest son of Agnes, and he was served heir of provision to his grandfather. Isobel, the second daughter of William Hutchinson, insisted in an action before the Sheriff of Roxburghshire, concluding against William Brack

for payment of the 500 merks provided to her, and also concluding against William Brack, elder, as administrator for his son. William Brack, younger, pleaded, That he was a minor, under eleven years of age, and could neither sell lands nor contract debts for payment of the 500 merks, or of the 1000 merks provided to the other two daughters of William Hutchinson: That, if he should die during minority, and without heirs-male of his body, the succession would devolve upon the heirs-male of the body of Isobel: That, in such circumstances, it was unreasonable for personal execution to go against William Brack, younger: That the decret to be taken could have no other effect than that of a decret *cognitionis causa*, on which Isobel might adjudge the estate. William Brack, elder, pleaded, that, as administrator-in-law for his son, he could not be personally subjected in payment of debts affecting his son's estate, but that he was nevertheless willing to pay the 500 merks upon an assignation.

The PURSUER ANSWERED,—That, as William Brack represented his grandfather, *passive* decret must go against him personally,—execution however being suspended till he come of age: And, as to the offer of payment upon assignation, she refused to accept of it.

On the 8th April 1766, the Sheriff “repelled the defences and decerned.”

William Brack, elder and younger, brought the cause into the Court of Session by bill of advocation, and repeated the reasons urged before the Sheriff.

It was ANSWERED for the PURSUER,—That, as William Brack takes by the disposition, he must be personally liable, for that is the condition of his right. As to the offer of payment upon assignation to William Brack elder, there is no law which obliges a creditor to take his payment from a third party upon assignation, when he can recover it directly from the debtor himself upon a discharge. The debtor cannot plead that he will not pay, because a third person is willing to purchase his debt.

On the 11th July 1766, “The Lords remitted to the Sheriff, with this instruction, that he see an assignation made out.”

1766. July 16. CORPORATION of HAMMERMEN in STIRLING, against JOHN GOODFELLOW, Watchmaker there.

The privileges of the Corporation of Hammermen in Stirling, found not to extend to the exclusion of a Watchmaker's working there, although he refused to enter a member of the Corporation.

[*Faculty Collection*, IV. 74 ; *Dictionary*, 1963.]

On the 6th April 1765, John Goodfellow, watchmaker, was admitted, by the magistrates and town-council of Stirling, “to the liberty and freedom of a burgess, *qua* hammerman, took the burgess oath, and paid the dues of his entry.” By entering as a craftsman of one of the incorporations, he paid only half of the dues which he would have paid had he entered as an ordinary burgess. Good-

fellow wrought at his trade of watchmaker, but did not apply to be admitted a freeman of the incorporation of hammermen. On the 13th April 1765 the incorporation passed an act requiring him to enter with them, and, as his essay-piece, to produce the carteret wheel of a watch made by him. In order to force his obedience, the incorporation brought an action against him before the magistrates of Stirling, concluding that he should either make his essay-piece and enter, or that he should be debarred from working as a watchmaker. The magistrates decerned in terms of the libel, and found the defender liable in expenses of process, which they taxed to thirty shillings. Goodfellow brought a suspension of this sentence.

The Lord Minto, Ordinary, on the 17th December 1765, “suspended the letters *quoad* the thirty shillings of expenses, but found the letters orderly proceeded as to the rest, and decerned.” And on the 14th February adhered.

The suspender applied to the Court by reclaiming petition, to which answers were put in.

ARGUMENT FOR THE SUSPENDER :—

The suspender used many words to show that the hammermen of Stirling were not an incorporation ; but there was evidence produced of their acting as incorporation for time immemorial, and this was held sufficient. The same question occurred some years ago with respect to the tailors of Perth, so that it would be superfluous to state the arguments upon a question which admitted of no doubt. The argument then resolved into this, that the science of watch-making is totally distinct from the trade of a hammerman ; that hammermen cannot force a watchmaker to enter with them, because they cannot take trial of his abilities, a striking example whereof occurs in the present case, where they appointed the suspender to make a carteret wheel, although there be no such wheel in a watch : that, if the suspender desired to act in the corporation of hammermen, he might be obliged to enter with them ; but this he does not desire, being as little versant in their trade as they are in the science which he professes ; and his entering burgess, *qua* hammerman, was owing to his ignorance,—he took his freedom in such form as the magistrates gave it him.

ARGUMENT FOR THE CHARGERS :

There has not been above one watchmaker at Stirling during any one period, and such watchmaker has always entered with the incorporation of hammermen ; the demanding a carteret wheel for an essay-piece was an error of the clerk of the incorporation, who wrote carteret for cantret. There is no reason why a watchmaker should not be considered as a hammerman, in like manner as a silversmith or jeweller is. The suspender, by entering burgess, *qua* hammerman, paid but half dues of what he would have paid had he entered as simple burgess ; and since he himself chose to be held as a hammerman, he must either make his essay-piece and enter, or desist from his work.

On the 16th July 1766, “the Lords suspended the letters *simpliciter*.”

For the chargers, M'Laurin, Lockhart. *Alt.* D. Armstrong.

OPINIONS.

PITFOUR. Prescription is sufficient to constitute an incorporation. Watchmakers have all along been considered in Stirling as part of the incorporation of hammermen.

AUCHINLECK. The watchmaker business is different from the smith trade. If I could see that the hammermen had ever debarred watchmakers from working unless they entered with the incorporation, there would be more difficulty. A man may be admitted a member of an incorporation in order to have a vote at an election, but he cannot be forced into the corporation when his trade is different from that of all the members of the incorporation.

ALEMORE. Who is it that must try the qualifications of the watchmaker?—"they who cannot so much as spell the name of the essay-piece!"

KAIMES. A man may *choose* to be taken into a corporation: But, here, no proof that he can be *obliged* to enter.

COALSTON. Corporations may be established by usage as well as by grant: When by usage, it must be proved. If multitudes are conjoined in an incorporation, and no proof that any acted without being so received, usage will be held proved. But here there are not examples sufficient to establish such usage.

KENNET. Here all the proof of possession that can be had; for it is proved that the watchmakers in Stirling have, past memory, entered with the hammermen.

PRESIDENT. It is incumbent on the suspender to show, that watchmakers have ever acted in Stirling without being of the incorporation of hammermen.

Diss. Kennet; President.

1766. *July 18.* WILLIAM STEWART, King's Remembrancer in the Court of Exchequer in Scotland; WILLIAM HAY, Writer to the Signet, &c. Creditors of Sir John Douglas of Kelhead, together with THOMAS CARLYLE, Factor, appointed by the Court of Session, upon the Sequestrated Estate of the said Sir John Douglas, *against* GEORGE LOWTHER, Tenant of the lands of Tod-holes, part of the said Sequestrated Estate.

LITIGIOUS.

A Ranking and Sale, without Sequestration, does not bar Ordinary Acts of Management, but bars Extraordinary Acts, such as the granting of a new lease during the currency of a previous one.

[*Sel. Dec. No. 242; Dictionary, 8380.*]

THE deceased Sir William Douglas purchased the lands of Tod-holes, and was infeft therein. He executed an entail of his estate, comprehending Tod-holes, in favour of Sir John his eldest son, &c. Upon the death of Sir William, his eldest son Sir John made up titles to the estate of Kelhead, by charter and seasine, but he possessed Tod-holes upon his right of apparency, without making up any feudal titles. In February 1749, Sir John Douglas granted a lease of Tod-holes to George Lowther and William Irvine, for fifteen years. The entry was at Candlemas 1749 to the arable lands, and at Whitsunday

LORD HAILES.

1749 to the houses and grass. The rent was £30 sterling, and £3 of stipe to the minister. The tenant was farther taken bound to pay the land-tax, a other public burdens. Sir John contracted great debts, and in particular borrowed L.7000 sterling from Mr William Stewart, for which he granted him two heritable bonds, with infeftment over the estate of Kelhead. The infeftment did not reach Tod-holes, in which Sir John himself was not infeft. Sir John became, to all appearance, in bankrupt circumstances. His creditors did diligence, and, in particular, Mr William Stewart deduced adjudication of the whole estate for the accumulated sum of L.9230 sterling. In 1756, a ranking of his Creditors, and an action for sale of his estate, was brought by Mr William Stewart. During the dependance of this ranking and sale, Sir John Douglas granted another lease of Tod-holes, concerning the validity of which the present question occurred. In January 1758, he granted to George Lowther, Irvine,—the other tenant being dead,—a new lease of Tod-holes, for fifteen years, from Candlemas and Whitsunday 1764, as to the arable and grass lands *respective*, for the rent of L.40 sterling, in full of all prestations. This new lease was granted during the currency of the former one, and the entry to it was not for six years after the time of the bargain. In July 1758, Sir John's estate was sequestrated, and, in August 1758, Thomas Carlyle was appointed by the Court factor thereon. In 1765, Mr Stewart, and other creditors, together with Thomas Carlyle, the factor, insisted in a reduction of this new lease, and concluding for the removal of Lowther. Lord Pitfour Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER :

Observed that the summons of reduction was originally brought in the name of Mr Stewart and Thomas Carlyle: that other names had been afterwards added as the names of pursuers: that this he apprehended was unwarrantable for the reason by him offered. He therefore endeavoured to show that neither Mr Stewart nor Thomas Carlyle had any title to reduce his new lease, or to remove him from his possession. With respect to Mr Stewart, he pleaded, that his infeftment did not reach over the estate of Tod-holes, in which his author, Sir John Douglas, was not infeft, and his adjudication contains only the lands contained in his infeftment. With respect to Thomas Carlyle, the factor, it was pleaded for the defender, that the factor on a sequestrated estate has no power to insist in a removing of tenants, or in the reduction of their tacks, or to do any other thing relative to the administration of such estate. Thomas Carlyle has a special power to remove Sir John Douglas "from such parts of the estate as he possesseth;" he has general powers to levy the rents, and his factory is also granted with the usual powers, and "particularly to remove the tenants of Sir John Douglas, the common debtor, from such parts of the estate as he possesses:" But the factor has no power to remove tenants at large from off the whole estate. By the sequestration, the whole right to the estate devolves upon the Court, and the Court is in the interim the absolute proprietor. The Court might have communicated, to its factor, that part of a proprietor's power which consists in removing tenants; but this it has not done. And, as the factor was not specially authorised to remove tenants, such as the defender, he ought to have applied to the Court for directions. But, *2dly*, Upon the merits of the ques-

tion, the defender pleads that the lease is valid in law. It was a deed which Sir John Douglas could grant, being a lease for a moderate term of endurance and for an adequate rent; and the defender was in possession in virtue of the new tack, before the present challenge was brought. No infeftment, nor charge, against the superior, has followed upon any of the adjudications; so that unless the creditors can subsume, upon the statute 1621, that the lease was fraudulent, they cannot reduce it. The reason is this,—an adjudication does not of itself vest an estate in the adjudger, until infeftment follows; it is no more than a personal right, importing a legal assignation to the rent, and authorising an action of mails and duties; but it divests not the proprietor of the fee of the estate, or of his power of administration. Until infeftment follow, an adjudication is no proper title for an action of warning: it is not sufficient for founding a reduction of a real right over lands; and, as leases clothed with possession are real rights *in suo genere*, it is not sufficient for founding a reduction of such lease. These adjudications, therefore, without infeftment, could not hinder Sir John Douglas from granting leases, nor tenants from accepting leases from him. His power, and their *bona fides*, endured until the time at which the estate was sequestrated by the Court. Neither can it make any difference that the new lease was granted before the expiry of the old one; for, to a tenant in possession, there is no difference between a prorogation of a lease to take instant effect, or, as in this case, after four years. What Sir John granted was equivalent to a new lease for nineteen years; but, instead of taking a renunciation of the old lease, he granted a new one for 15 years, to take effect after the four years of the old lease had run out. This was an ordinary act of administration; for it is what prudent proprietors often do, in order to prevent tenants from neglecting their grounds, as they are apt to do towards the expiry of their leases. But further, the defender is secured, by the Act 1449, which provides that “the tackers sall remaine with their tacks unto the isheiw of their termes quhois hands that ever thair lands may cum to.” And so it has been found by three decisions mentioned in the Dictionary, title Tacks, folio 421, 7th March 1604; 20th July 1622;—and *Richards* against *Lindsay*, January 1725, where the Court sustained second tacks granted during the currency of the first, although the prorogation did not commence till after the right of the singular successor.

ARGUMENT FOR THE PURSUERS:—

After Sir John Douglas had contracted the debts above the value of his estate, after heritable bonds had been granted over such parts of the estate whereof he was the feudal proprietor, after inhibitions had been used and adjudications deduced, after a ranking of his creditors, and a sale of his estate had been brought, Sir John Douglas granted this new lease. Before possession could follow upon it, the estate was sequestrated. This state of the fact sufficiently answers the defender’s argument: The Act 1449, in order to render a lease effectual against singular successors, requires possession on the lease; here there was no possession on the new lease, nor could be till after the estate was sequestrated. It does not vary the case that the right of the singular successor is redeemable, as being upon adjudication. If the right is redeemable, the tenant may, upon redemption, claim possession from the lesser or his heirs, but he cannot maintain possession upon a right which was personal at the date

of the singular successor's right. Besides, a ranking and sale is a common action for the behoof of all the creditors of the bankrupt, and, during that action, the bankrupt can do nothing which may diminish the value of his subjects to his creditors. The granting of a new lease, to take place at an after period, does certainly diminish the value to the creditors. Whatever may have been found in more ancient cases, this question has been twice determined, within these few years, against the tenant, in favour of the creditors,—*4th January 1757, Creditors of Lord Cranston against Scot*; and *2d July 1757, Creditors of Douglas of Dornock against Carlisle*. No special powers are necessary for authorising the Lords' factor to insist in such removing. Such powers are not usually given in the practice of the Court, and indeed it is not fit that they should. They could not be granted unless *causa cognita*; then the Court would, previous to the removing, take cognizance of the merits of the removing, or, in other words, determine a cause before the defender was cited. If a factor should bring such process of removing improperly, the Court would dismiss it. Here the defender confounds the title to pursue, with the merits of the action. The factor has a title to pursue, but still the question as to the merits of the action remains entire. That the creditors have a right to pursue is manifest: The sequestration is for their behoof, it does not diminish their right in the estate: and, accordingly, in the case *Lord Cranston's Creditors*, and in that of *Dornock's Creditors*, action proceeded at the instance of the creditors only. That the adjudications produced are not completed by infestment, will not vary the case. As the lease was not clothed with possession, it was but a personal right; and an adjudication without infestment is a good title to reduce any personal right which may interfere with it. But further, it is now established in practice, that an adjudication without infestment is a sufficient title for carrying on a reduction of any right affecting the lands adjudged, whether established by infestment or not; and thus actions of this nature are daily sustained upon simple adjudications on trust-bonds. It is not an ordinary act of administration to grant a lease to take place at a distant period: Had the tenant reaped no benefit by this deed, he would not have struggled so much in maintaining it against the creditors.

On the 27th February 1766, "The Lords sustained the reasons of reduction, reduced, and decerned, and found that the defender must remove."

On the 18th July, they adhered, upon advising petition and answers.

Act. R. M'Queen. Alt. D. Armstrong. Reporter, Pitfour.

OPINIONS.

COALSTON. An adjudication alone does not prevent the proprietor from setting tacks: Here, the tack was during the currency of the former one, and sequestration was awarded before the new tack commenced: I think the sequestration has the effect of an infestment, and so will stand in bar of the tack.

PITFOUR. In the case of *Cranston* there were infestments; none here: Had the tenant entered into possession, the new lease would have been good; for

the grant of tacks is an ordinary act of administration, but it is no ordinary act of administration to superadd one lease to another.

1766. *July 22.* JANET WATSON, Relict of James Watson, Merchant in Edinburgh, *against* PATRICK JOHNSTON, Son of William Johnston, Smith in Edinburgh.

FIAR.

The fee of a subject proceeding from the wife, taken to the spouses in conjunct fee and liferent, and the heirs of the marriage in fee, found to be in the husband.

[*Faculty Collection, IV. 268 ; Dictionary, 4288.*]

On the 6th October 1740, a postnuptial marriage-contract was entered into by William Johnston and Rebecca Muirhead. By it William Johnston became bound to provide 2800 merks of his own money, and to add to it 1000 merks assigned to him by Rebecca Muirhead, and 1800 merks as the value of a tenement mentioned in the marriage-contract, and to take the rights of the whole, amounting to 5600 merks, "to himself and his spouse, and the longest liver of them two in liferent, and the bairns of the marriage in fee." In the same form is the conquest during the marriage provided. The contract contains also the following clause: "That in case the said marriage shall dissolve, by the said Rebecca her predeceasing without children, that then she shall have it in her power to dispose of all or any part of the subjects, and sums above-mentioned, brought with her, in favours of whatsoever person she shall think fit, without advice or consent of the said William Johnston, he always being allowed to liferent the same." For these causes Rebecca Muirhead assigned the sum of L.60 sterling to William Johnston, his heirs and donatars; and she farther "sells, anailies, and dispones in favour of her husband and herself, in conjunct-fee and liferent, and to the heirs of the marriage in fee," a tenement of houses in Musselburgh which was redeemable by James Muirhead, writer in Edinburgh, on payment of L.100 sterling; and which is the tenement above-mentioned in the husband's part of the marriage-contract. The contract contains precept of seasine in common form. On the 7th October 1740, seasine was taken upon the precept in this marriage-contract. William Johnston died before his wife, leaving issue, by her, Patrick Johnston. It does not appear that William Johnston ever performed the obligations incumbent on him by the marriage-contract. James Muirhead, the reverser in the tenement, was found liable, by decret of the Court, 16th February 1762, to pay L.100 sterling, as the redemption-money of the tenement, to Patrick Johnston, executor of his mother Rebecca. Thus much having been premised, it is to be observed that, on the 15th June 1752, William Johnston granted a bill to Janet Watson, the pursuer, for L.27: 8s. sterling. She insisted, in an action for payment, against Patrick Johnston, as heir of William; and she arrested in the hands of James Muirhead that L.100 which

he had been liable by decret of the Court to pay to Patrick Johnston in right of his mother Rebecca. Muirhead, the arrestee, raised a multiplepinding, wherein he called Janet Watson and the creditors of William Johnston. Being charged on the decret obtained by Patrick Johnston for the L.100, he suspended. The multiplepinding and suspension were conjoined. Muirhead contended that he himself was a creditor of William Johnston, and that William Johnston had no other subject but the said L.100, the price of the tenement : that therefore he, Muirhead, had an interest to plead that the fee of the subject was in William Johnston, not in Rebecca, whereby his son Patrick, before he could draw, would be liable for his father's debts. The same plea was maintained for the pursuer, Janet Watson. This is the state of the fact, in so far as necessary to be known, though at the same time it must be observed, that, by reason of great knavery and litigiousness on the part of Muirhead, the question was much involved before the Lord Ordinary, and even in the Inner-house.

ARGUMENT FOR THE PURSUER :

The general rule of law is, that, when a right is taken to a husband and wife in conjunct fee and liferent, and to the heirs of the marriage in fee, the husband is understood to be *fiar*. From this general rule there are two exceptions : *1st*, When the last termination is upon the wife's heirs : *2dly*, When the subject flows from the wife. The *first* objection can have no place here ; for the termination is not to the heirs either of husband or wife, but only to the heirs of the marriage. The *second* exception, When the subject flows from the wife, cannot have place here any more than the first. There is good reason for this exception when the right flows gratuitously from the wife. Thus, if, after the marriage, without any previous obligation, she should take a subject of her own to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee, it may be reasonably presumed that she intended a simple liferent to her husband, and a hope of succession to her children, but that she intended to reserve the fee to herself. The case here is widely different : The wife, *nomine dotis*, and in consideration of settlements made by her husband upon her and the children of the marriage, did confer two subjects upon her husband, viz. the L.60 sterling, and the tenement redeemable for L.100 sterling ; and it is certain law that a right, though flowing from a wife, belongs in fee to the husband, if granted *nomine dotis*. This doctrine is supported by decisions of the Court, collected in the Dictionary, *voce Fiar*, vol. 1, p. 297. Thus, Forbes, *23d July 1713, Edgar against Sinclair* : One having, for love and favour, and other onerous causes, assigned to his daughter and her husband, their heirs and executors, a certain sum owing to him by a third party ; the Lords found that the wife had the liferent of the whole, but the husband the fee. Durie, *29th January 1639, Graham against Park* : A subject, given by the wife's father, was found to belong in fee to the husband, because given *nomine dotis*, although the last termination was to the wife's heirs. And under the same title, p. 300, *July 1720, Creditors of Northsinton against Elliot of Borthwickbrae* : Where the wife disposed the subject, and where the first destination of succession was upon her heirs, yet the fee was found to be in the husband, because the subject was given *nomine dotis*. The general argument here urged is supported by the particular circumstances of the case in question. The sum in the marriage-contract belonged partly to the husband, partly to the wife. The argument of Patrick

Johnston must lead him to maintain that the fee belonged, not partly to the husband partly to the wife, but wholly to the wife. *2dly*, Here the wife, "in consideration of the marriage, sells, annuities, and disposes in favour of her husband and herself, in conjunct fee and liferent, and to the heirs of the marriage in fee," the foresaid subject. The marriage was itself a valuable consideration, and the subject being thus sold for a valuable consideration, the right in him cannot be taken up by Patrick Johnston otherwise than as his heir. *3dly*, In the event of no children, power is given to the wife of disposing of the subjects brought by her, without her husband's consent. This shows that the fee was wholly in him; for, if it were not, why give the wife a power which she already had?

ARGUMENT FOR PATRICK JOHNSTON:

The decisions of the Court have not uniformly found that a husband is *fiar* of subjects conveyed by his wife *nomine dotis*, and taken in conjunct fee. The last judgment mentioned in the Dictionary, under this head, is in favour of the wife, *June 1733, Angus against Ninion*, where a sum assigned by a woman, in her marriage-contract, in name of tocher to herself and husband, and longest liver in conjunct fee and liferent, and the heirs of the marriage; which failing, to the donee's heirs and assignees,—was found to belong to the wife as *fiar*. But further, Janet Watson erroneously supposes that the subject was given *nomine dotis*; but the contract does not say so, and there is no ground for presuming it. As William Johnston had no prospect of making any fortune whatever, the L.60 assigned to him by his wife, and actually spent by him, was a *dos* amply sufficient. Besides, here was a postnuptial contract, not one entered into before marriage, so that the wife was under no obligation to give the subject to her husband; and, if she did give it, then she made him a gift of the subject, which is not to be presumed. In the case *Graham against Park, 29th January 1689*, the contract was prior to the marriage. In the case *Elliot, July 1720*, the subject was given, failing heirs of the wife's body, to the husband's heirs and assignees; and, in both, the subject was expressly given *nomine dotis*: and as the *dos*, by the law of Scotland, becomes the absolute property of the husband, there was an implied conveyance to him. The concession that Janet Watson makes, in putting the case "of a subject belonging to the wife, being conveyed by her after the marriage, to herself and husband in conjunct fee and liferent, and to the heirs of the marriage in fee," is directly against her, for that case is precisely the present one. As to what is said from the tenor of the contract, that the subject therein mentioned belonged partly to the husband and partly to the wife, and that Patrick Johnston's argument must lead him to maintain that the wife was *fiar* of the whole, it is answered that William Johnston never performed his part of the obligation; and though he had, there is no difficulty in supposing that the fee of what came from him was descendible to his heirs, of what came from the wife to her heirs. As to the argument, from the style of the marriage-contract, whereby the wife "sells in favour of herself and husband," &c., it is answered, that this is a clause of style invariably used in marriage-contracts. It is only in such contracts that subjects are provided "in conjunct fee and liferent to the husband and wife;" so that, if Janet Watson's argument be good, the fee can never be in the wife at all. The clause, giving the wife a free power of disposal, is at most superfluous; and *superflua non nocent*: it has been inserted for greater security to enable the wife to dispose of a sub-

ject during the coverture, without the consent of her husband, her legal curator. It seems strange to assert that the fee was in the husband, because he had not the disposal of the subject, and not in the wife, because she had. The effect of this clause may be illustrated from a case mentioned by Lord Stair, p. 228, n. edit., *27th June 1676, Earl of Dunfermline*, where an obligation by a man to provide the conquest during the marriage to him and his wife in conjunct fee, and, in case of no children, the one half to be disposed as the wife thought fit, was found to make the conquest divide between his and her heirs, so that the wife had not merely a personal faculty, but a fee in the half. The present case is stronger in favour of the wife: for *here* the subject confessedly flowed from the wife, but *there* the clause related to conquest, which must be presumed to flow from the husband.

On the 5th December 1765, the Lord Strichen, Ordinary, found "that the fee was in the mother and not in the father."

On the 18th January and 5th February 1766, he "adhered."

The Lords, on the 22d July 1766, having advised a petition and answers, "found that the fee was in the father and not in the mother."

Act. William Wallace. *Alt.* A. Rolland.

OPINIONS.

PITFOUR. The decisions are uniform. The principles are, *1st*, To whose heirs is the fee provided? *2dly*, Whence did it flow? In this case, Where is the property? Answer, In the husband. Here, both a tocher and the conquest are provided; both are the property of the husband. A tocher, in particular, is given to the husband *ad sustinenda onera matrimonii*. If, after the husband's heirs, the subject is provided to the wife's heirs, as in the case of *Scot of Blair*, an *estate* is settled by the wife, not a *tocher*. Here there is no word of the wife's heirs; how then can the wife have a fee? The conquest is settled in the same way, and conquest must certainly go to the husband's heirs. A man and his wife join their stock to the husband and his wife, and to the heirs of the longest liver. If the wife is the longest liver, her heirs succeed, not to the wife, but as heirs of provision to the husband.

This judgment pronounced without a vote.

1766. July 23. JOHN MACDOUGAL, Son to John Macdougall in Ballinaid,
against WILLIAM OLIPHANT, Gardener in Kelso.

WRIT.

Bill Signed by a Mark.

MACDOUGAL, as executor, *qua* nearest of kin to Daniel Irvine, day-labourer at Peick, in England, and Oliphant, as pretending right by assignation from

Daniel Irvine, both laid claim to a bill for L.26 sterling, granted to Irvine by John and Andrew Gillans. The form of the assignation to this bill is as follows,—being wrote on the back of the bill itself: “*Peick, April 7, 1759.* This bill I grant to James Wright, for debt due to him in my trouble and sickness; and I, Daniel Irvine, give this bill of John Gullan and Andrew Gullan, as just money borrowed of me in my illment,—the sum which is 24 pounds 4 shillings and sixpence: Given this bill before these witnesses, ✕ Daniel Irvine, his mark. Charles Campbell, *witness*, John Brown, *witness*.” “Pay the contents of the within, and bill thereto relative, to William Oliphant, gardener in Kelso, or order, for value of him. James Wright.”

In a multiplepounding, raised by the Gullans, debtors in the bill, and called before the Lord Gardenston, Ordinary, Oliphant claimed to be preferred in right of the assignee. Macdougall, the executor, objected, that the deed, by which the bill was said to have been made over to Wright, was not probative; for that it was not wrote upon stamped paper; the sum was in figures, not in writing; the deed did not bear a particular reference to the bill, and it was signed by two cross-lines X, whereas the bill itself was signed by Irvine's initials. On the other hand, Oliphant contended that the bill had been assigned to Wright in security of L.24:4:6d. sterling, furnished by him to Irvine, upon death-bed, and that the conveyance was in the form allowed by the law of England.

The Lord Ordinary found the deed on which Oliphant claimed, to be not probative, but found it competent for him to instruct, by the oaths of the subscribing witnesses, that Irvine had adhibited his mark to it, and that Wright had advanced money, or furnished necessities, to Irvine, to the extent of the sum therein mentioned.

Macdougall, in a representation, pleaded that, by the law of England, the seal of Irvine ought to have been affixed; that a proof of the furnishings by witnesses was prescribed; and that advances in money could not now be proved otherwise than by the writing of the deceased.

To this Oliphant made answer, that Macdougall had acknowledged the justness of the debt due by Irvine to Wright, and had offered his own bill to Oliphant, in lieu of the bill granted by the Gullans. Oliphant required Macdougall to confess or deny those facts by a writing under his hand.

On the 25th June 1766, The Ordinary appointed Macdougall so to confess or deny.

Macdougall again represented, and prayed, “that, as the question was *de facto proprio et recenti*, the Lord Ordinary should ordain Oliphant to refer it simply to his oath; or otherwise, that his confessing or denying should be held equivalent to his oath.”

On the 11th July 1766, The Lord Ordinary refused this representation.

Macdougall applied to the Court by reclaiming petition. He therein admitted that, according to the usual forms of procedure, it is competent for either party to require the other to confess or deny facts; but he contended “that form, which is but the handmaid of justice, ought not to be prostituted for the purpose of protracting law-suits;” that he himself is a seafaring man, at present out of the kingdom; and that, if he should be found, and should deny the

facts, Oliphant would require his oath, and many years might intervene before he could be found again to make oath.

On the 23d July 1766, The Lords "refused the desire of this petition, and adhered to the interlocutor of the Lord Ordinary."

For the Petitioner, R. Campbell.

OPINIONS.

PITFOUR. In a declarator of trust between Sir James Reid and the Earl of Northesk this very question was agitated, and determined agreeable to the Lord Ordinary's interlocutor.

1766. July 23. JOHN ROBERTSON, Son of the deceased Paul Robertson of Pittagowan, *against* JANET ROBERTSON, daughter of the deceased Donald Robertson of Pittagowan.

PROVISION TO HEIRS AND CHILDREN.

A Sum of Money "provided to the Heirs-male or Female of a Marriage," and Payable on *their* obtaining Majority, or being Married, found to divide among all the Children equally.

PAUL Robertson was twice married. By his first wife he had issue Donald, who had only one child, Janet the defender: By his second, he had issue John Robertson, the pursuer, and two daughters. By marriage-contract between Paul Robertson and his second wife, to which his father, John, is a party, "the said Paul and John Robertsons bind and oblige us, our heirs, and executors, to pay to the heirs-male or female of the said marriage, the sum of 1000 merks, by advice of friends, at their attaining to majority, or sooner, if they be married before then, and in the meantime to entertain them," &c. In the event of the decease of the heirs of Paul's first marriage, without heirs of their bodies, Paul and John became bound to secure the lands of Pittagowan to the heirs-male of this marriage. John Robertson insisted, in an action against his niece Janet, as representing the obligants in this marriage-contract, for payment of the 1000 merks, with interest. Many defences were proponed by Janet, which were first sustained by Lord Barjarg, Ordinary, and afterwards repelled by the Court: they relate to matters of fact, and do not deserve to be recited. At length she moved a partial defence in the following terms:—Of Paul's second marriage there existed, besides the pursuer, two daughters. By the conception of the contract, to the heirs-male or female of the marriage, all the children have an equal right to the 1000 merks. Where mean people provide so pitiful a sum as 1000 merks to the heirs-male or female of a second marriage, children, whether male or female, must be understood. It could not have been the intention to give the whole to one son, and leave all the other

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children destitute—nor could there be any purpose of establishing an heir-male, properly so called, for perpetuating a family descended from a second marriage of Paul Robertson. Upon these principles the Court found that L.1000 Scots, settled in a second marriage-contract to the heirs of the marriage, did divide among all the children equally, February 1727, *M'Doual* against *M'Doual*; and a like construction was put upon a clause in a marriage contract, where the words *heirs-whatsoever* occurred, 13th June 1760, *Watson, &c.* against *The Younger Children of Robert Scott*. That such was the intention of parties in this case appears from the term of payment being "on their attaining" to majority or marriage. This plainly relates to all the children of the marriage, and cannot be limited to the heir, properly so called, of the marriage. The pursuer therefore can have action for no more than one third of the sum in the obligation: the other two-thirds are exigible by his sisters.

It was ANSWERED for the PURSUER,—That the provision to the heirs-male or female of the marriage is plainly taxative to heirs-male, if any such should exist; and, failing heirs-male, to the heirs-female. Had the intention been that all the children should inherit this provision, as in the case of *Watson*, or to the heirs-whatsoever, or bairns of the marriage, it would have been conceived to the heirs of the marriage, as in the case of *M'Doual*. The limitative distinction of heirs-male and heirs-female is inconsistent with such construction. On the 23d July 1766, "The Lords, in regard there were two other children of the marriage, besides the pursuer, found the defender liable in no more than one-third of the 1000 merks, with interest."

Act. W. Nairne. Alt. W. Mackenzie.

OPINIONS.

KENNET. The clause in the marriage-contract gives no more than one-third to the pursuer. When the whole of the clause is taken together, it appears that *or* means *and*.

PITFOUR. Of the same opinion: When the strict meaning of words occasions an ambiguity, the clause must be explained from circumstances. *Or* and *and* imply the same thing, and mean the children, whether male or female.

1766. July 23. ANDREW TAIT, Organist in Aberdeen, against JOHN SLIGO Merchant in Aberdeen.

REMOVING.

Not necessary to raise an Action of Removing, or use formal warning 40 days before term of removing, from tenements within borough.

[*Faculty Collection, IV. 76; Dictionary 13,864.*]

JOHN Sligo possessed a shop in Aberdeen belonging to Andrew

Andrew Tait informed Sligo that he was to dispossess him at Whitsunday 1766, and put another in possession of the shop. This he did so early as December 1765. Andrew Tait accordingly set the shop to one Byres, who dealt in the same commodities as Sligo. Sligo took Byres's shop, and made no secret of his being to remove at Whitsunday 1766 from his old shop. Tait, imagining that every thing was adjusted, did not give Sligo any formal warning. Sligo let the shop which had been formerly possessed by Byres, and then resolved to make good his possession of the old shop for another year, on account of his not having been formally warned to remove. Tait applied to the Magistrates of Aberdeen, praying the interposition of their authority for removing Sligo at the term. The Magistrates, having taken a proof of the facts, pronounced the following interlocutor:—"Find sufficient evidence in process that Andrew Tait notified timeously to John Sligo that the shop in question was set to another tenant, and that John Sligo so far accepted of the notification, that he told to some of the witnesses that Andrew Tait had set the shop he possessed to James Byres; but, also, that the defender had actually taken another shop for himself." And therefore they decerned in the removing.

Of this judgment Sligo offered a bill of suspension.

ARGUMENT FOR SLIGO, THE SUSPENDER:—

Although all the solemnities required by the Act 1555, in removing from rural tenements, are not necessary in removing from burghal tenements, yet even in the latter some forms are necessary. Thus Craig says, lib. 2. Dieg. 9, § 9: *In burgis, sive prædiis urbanis, sufficit si officarius urbis publicus, mandato balivi instructus, etiam sine scripto, 40 dies ante ferias Pentecostis, ad ædem conductam denunciaverit, migrandum esse ei.* To the same purpose Lord Stair speaks, b. 2. tit. 9. § 40. Lord Bankton says, vol. 2, p. 109, § 52:—"It is sufficient that the officer, without any written warrant from a magistrate, but only in virtue of his office, by a verbal order from the heritor, warn the tenant by chalking the most patent door of the dwelling-house forty days before Whitsunday. This chalking of the door must bear some indication of the tenant's being warned, and the officer's name must be marked, and all the solemnities performed before two witnesses." To the same purpose Mr Erskine speaks, b. 2, tit. 6, § 20. Thus also, in a decision quoted by Harcus, tit. Removing, the Court found "that, a malt-kiln and barn being set for a year, and not for a month or quarter, the tenant could not be removed without a preceding warning forty days before the term, more than other tenants could be removed without such due warning." Were there any difficulty as to the question whether warning be requisite in urban tenements, it is removed by the statute 1690, c. 39, which provides "that the legal term of removing, both in borough and landward, shall be the 15th day of May, upon warning forty days preceding the same." And although warnings within burgh have been sustained, when used forty days before the term of removing, although not forty days before Whitsunday, yet there is no example of a removing being sustained where there was neither warning used nor action raised forty days before the term of removing. Were the necessity of a warning within borough once dispensed with, every removing would become an arbitrary question, to be determined upon particular circumstances,—than which nothing can be of worse consequence.

ARGUMENT FOR TAIT, CHARGER :—

It is confessed by the suspender that the Act 1555 does not relate to urban tenements. Why it should have been limited to prædial tenements is obvious. A tenant cannot always provide himself in a farm, but has not the same difficulty in providing himself in a house. In the latter case, therefore, it is sufficient that timeous notification be made to the tenant, without any necessity of a formal warning; and hence the notification may be given forty days prior to the term of removing, whereas in prædial tenements warning must be given forty days prior to Whitsunday, be the term of removing what it will. *24th July 1623, Ker against Foulis.* It remains then to inquire what sort of notification is required in warnings from urban tenements. This, as not regulated by statute, must be regulated by custom in different burghs. In Edinburgh, the practice of a town's officer's chalking the door has been commonly used. This, it is probable, induced Craig to mention this as a solemnity requisite, and he has been followed by Lord Stair and Lord Bankton. It is, however, to be observed, that Craig holds a verbal warning to be sufficient if given by authority of a magistrate, and that the chalking of the door is only necessary, in case access be not got to the house. "*Sufficit, si ad locum conductæ habitationis denunciatum sit, aut, si nemo adsit, ut signum aliquod denunciationis affigiet.*" Lord Stair says, b. 2, tit. 9, § 40, that warnings within borough "are regulated by the custom of the burgh." He also mentions the command of a magistrate. But here Lord Bankton differs from him, upon authority of a decision mentioned by Forbes, *24th June 1709, Barton*, where a verbal order from the proprietor was found sufficient. Lord Bankton further qualifies what he says, by observing "that this form of warning was at first used only in burghs royal, where, by the custom of the burgh, several peculiarities in divers instances are introduced different from the common course of law." From these authorities it appears that warnings within borough are regulated by custom, and that chalking the door is an evidence of the warning, not the solemnity required in warning; and that an officer may, upon the command of the proprietor, verbally warn. To apply these circumstances to the present case, it is certain that, by the custom of Aberdeen, warnings are given verbally. Sligo was warned verbally by the proprietor, which must be as valid as if the proprietor had employed the officer to warn him in the same form: and the proof of the fact of warning is as well established in this case, to have been in Sligo's hearing, as if an officer had chalked his door in his absence.

On the 24th June 1766, Lord Gardenston, Ordinary, refused the bill.

On the 23d July 1766, the Lords, upon advising a reclaiming petition and answers, adhered.

Act. D. Rae. *Alt.* Alex. Elphinstone.

OPINIONS.

KENNET. Sligo made the landlord believe that he was to remove, and therefore his present plea is barred *personali exceptione*.

AUCHINLECK. Warning is as necessary in boroughs as in the country. When the proprietor supposes that the tenant will go away willingly, he uses no warning. If he is mistaken in this supposal, the tenant will sit.

KAIMES. The Act, 1555, relates to rural tenements; matters of in-town remain as formerly. Notification by the landlord is sufficient, more especially as this notification was followed with the circumstance of the tenant taking another shop.

GARDENSTON. From the whole circumstances of the case, Sligo is barred, *personali exceptione*, by reason of his fraud.

COALSTON. The warning of the Act, 1555, is not necessary in urban tenements: some warning, however, is necessary: no law has said how that warning shall be; any notification then is sufficient.

HAILES. Sligo has here attempted to revenge himself both on Tait who set the shop, and on Byres who took it: On Tait by sitting still, and exposing Tait to an action of damages, at the instance of Byres; on Byres, by taking possession of his old shop, and debarring him from the new one. Strong evidence of *mala fides*, and an intention to misuse the law on the part of Sligo.

1766. July 24. ROBERT BLACKWELL, only Son of the deceased Mr George Blackwell, Minister of the Gospel at Bathgate, *against* HELEN BLACKWELL, Executrix of the deceased Dr John Johnston, Professor of Medicine in the University of Glasgow.

HEIR AND EXECUTOR.

Relief between Heir and Executor.

DR JOHNSTON had a sister, Christian, married to Mr Thomas Blackwell, Principal of the Marischal College at Aberdeen. His settlements, the subject of controversy, were made in favour of her and certain of her descendants. For understanding the relation they bore to the Doctor and each other, the following genealogical tree of the descendants of Christian Johnston is necessary:

Christian Johnston.	Mr Thomas Blackwell.
Mr Thomas Blackwell. Mr G. Blackwell. Helen. Christian. Janet.	
sans issue.	
Robert. Margaret.	Christian Hay.

On the 23d November 1747, Dr Johnston executed a deed of settlement, whereby he disposed his lands of Craignaught, &c. to his sister, Christian Johnston, in liferent, and in fee to her son, Mr Thomas Blackwell, his heirs or assignees whatsoever. This settlement contains a general assignation, of all his other heritable subjects which should belong to him at his death, to Mr Thomas Blackwell, and his foresaids, under the burdens, provisions, and reservations therein mentioned. He particularly assigned to him certain adjudications on the estates of Jordanhill and Garnock. Then follows this clause, "Providing always that the said Mr Thomas Blackwell, and the subjects before disposed to him, but not the liferent in favour of my sister, are, and shall be burdened with

the payment of L.200 sterling, to Christian Blackwell, my niece, and of 6000 merks to Christian Hay, my grand-niece, and of the annualrent of the said two sums, and penalties, if incurred; and a farther yearly sum of 100 merks to the said Christian Blackwell, while she remains unmarried, and of the payment of what farther sums I shall think fit, by a writing under my hand at any time in my life, or even on deathbed, to burden the said Thomas Blackwell, and the subject disposed to him." Dr Johnston, moreover, reserved his own liferent, and power to alter. At the same time he executed a bond in favour of Christian Hay, the heirs of her body, and assignees, in a marriage-contract, for 6000 merks, payable the first term after his death, with a proviso, that, in case she levied the money, it should be lent out with the consent of Mr Thomas Blackwell, his heirs, executors, or assignees, &c. "it being my intention that the 6000 merks be preserved, to return entire to my heirs and assignees, in case the said Christian Hay die without issue lawful of her body, or do not make over the same in her contract of marriage." This bond dispenses with delivery, and contains a power of revocation. It is supposed, that, in like manner, for carrying his settlement in execution, he granted to Christian Blackwell a bond for L.200. But she married during the Doctor's life, and he gave her a portion of 3000 merks, and destroyed the bond, if ever granted. In 1754, Dr Johnston granted a bond of annuity for L.15 sterling, to Janet Blackwell, his niece, to commence at the first term after his death. At the same time, or near it, he recovered L.263 sterling, in virtue of his adjudication of the estate of Garnock, and L.80 sterling, in virtue of his adjudication of the estate of Jordanhill.

On the 29th January 1757, Dr Johnston lent L.600 sterling, upon an heritable bond of corroboration, to Mains of Waterhouse. Christian Johnston the liferenter, and Mr Thomas Blackwell the fiar, by the settlement 1747, being both dead, Dr Johnston executed a new settlement on the 8th March 1747. By it he disposed his lands of Craignaught and others, to Helen Blackwell, his niece, in liferent, and also assigned to her all debts heritable or moveable that should be due to him at his death. Then follows this clause, "My said niece being always bound to pay all my just debts, and perform every deed I have come under, or may at any time of my life come under, whether gratuitous or onerous." He took her bound to pay a small legacy to John White, clerk of session, and an annuity of L.20 sterling to Janet Blackwell: and then adds, "And I bind and oblige me, my heirs and successors to me in the lands of Craignaught, &c. to pay to the said Janet Blackwell my niece, after the death of her said sister Helen, the foresaid yearly annuity of L.20 sterling, &c., and I hereby declare that these presents shall be nowise prejudicial to, or derogatory to any former deed granted by me in favour of the said Helen Blackwell, except in so far as hereby altered, and the said Helen Blackwell further burdened, but as a further confirmation and enlargement thereof." After the date of this settlement, Dr Johnston executed several deeds of donation, whereby he created additional burdens on Helen Blackwell, both as to his moveable estate and as to her liferent of the land estate. On the 10th June 1761, he executed a bond of provision, whereby he bound Robert Blackwell *nominatim*, as the person he intended to succeed to him in his land estate, to pay to his sister Margaret L.200 sterling, upon the succession fully opening to him by the death of all the annuitants on it. The Doctor received payment of the L.600 contained in the heritable bond granted by Mains of Westerhouse; so that

sum came to be reckoned in his executry. About the end of 1761, Dr Johnston died. Robert Blackwell, willing to suppose that the settlement 1747 had been innovated, made up titles to Dr Johnston's land estate by special service upon inventory as heir-at-law; and Helen Blackwell confirmed herself executrix to her uncle. Several of the legatees pursued Helen Blackwell before the Commissary Court of Glasgow for payment of their legacies. She removed the cause into the Court of Session by advocacy; and also raised a multiplepinding. In the multiplepinding Robert Blackwell was called among others: the processes were conjoined. The question between Robert Blackwell and Helen Blackwell resolved into this, Whether Helen Blackwell, the executrix, was entitled to relief out of the land estate, for the 6000 merks left by Dr Johnston to Christian Hay. In the course of the argument each party endeavoured to show that, if the 6000 merks was laid upon him, there would remain little of Dr Johnston's succession. Robert Blackwell contended, that the 6000 merks would well nigh carry off the residue of the land estate: Helen Blackwell that it would well nigh exhaust the executry. But it appeared that these considerations had little weight with the Court, and therefore they shall not be mentioned.

ARGUMENT FOR HELEN BLACKWELL, THE EXECUTRIX:—

Dr Johnston was unlimited proprietor of the estate, and might dispose of it as he thought best. He might have burdened his executrix with his real debts, or the disponee of his estate and the lands themselves with his personal debts; so that, in the question between the heir and the executor, the *voluntas testatoris* must be the rule. Settlements deliberately executed, whereby burdens are imposed, will not be presumed to be altered, unless the alteration be as explicit as the settlement; so that, *in dubio*, the presumption of law must be in favour of the original settlement. By the disposition 1747, Dr Johnston expressly obliged the disponee, personally, by his acceptance of the disposition, to pay 6000 merks to Christian Hay, and as expressly made that sum a burden upon the fee of the lands disposed, with a reservation of his sister's liferent. It follows, that the 6000 merks must remain a burden upon the lands, and upon the disponee taking under that disposition. The after settlement of the personal estate by the deed 1757, and the general clause therein contained, burdening the executrix with the payment of all his debts and performance of his deeds, cannot be understood as a departure from the settlement 1747, upon this plain and known principle, *quod in omni jure generi per speciem derogatur*. The obligation on the executrix might be beneficial to creditors.—It would have been implied, although not expressed; but its generality cannot affect the executrix in a question with the heir specially burdened. The principle here mentioned was established by the civil law, and has been followed in the practice of this Court; see Dictionary, title *Presumption*, head *Presumed Alteration and Revocation*. The application of those principles to the present case is obvious. It does not vary the case, that, in the interval between executing the deed 1747 and the deed 1757, Dr Johnston transacted the adjudications disposed by the deed 1747, and thereby left no heritable subjects to his heir other than the liferented lands; for, if Dr Johnston had meant to relieve his heir of the burden of 6000 merks when he deprived him of the benefit of the adjudications, he would have executed some deed to that effect. By renewing the liferent to Helen Blackwell upon the death of his sister, he showed that he remembered his having executed the deed 1747. By preserving

DECISIONS REPORTED BY

eed he showed that he meant it should have effect; and it is impossible to attribute the burden from the right itself: if the right subsists, so must the burden. Burden was not imposed upon this or that subject, but upon the whole; so, as long as any of the subjects to be taken under the disposition remained, long did the burden remain. The L.200 to Christian Blackwell, and the 30 merks to Christian Hay, were, by the deed 1747, made burdens upon the lands disposed. The lands were to be liferent, so that the heir could have no access to them for the present; and thus it is clear that Dr Johnston meant to burden his heir with payments, while he had no rents out of which to pay them. If the heir did not choose to borrow money for paying the burdens, he was at liberty to repudiate the succession. Dr Johnston, by the general clause in the deed 1757, burdening his executrix, did not mean that she should relieve his disponent of a special debt: This is against the general rule of law already mentioned. See 24th November 1710, *Calender*; and, 7th July 1732, *Strachan* against *Farquharson*. When Dr Johnston created different burdens upon his executrix, he never mentioned the 6000 merks to Christian Hay: this he would have done had he not meant that it should continue as a burden upon his disponent.

ARGUMENT FOR ROBERT BLACKWELL, THE HEIR:—

It is admitted that the present question is a *quæstio voluntatis*,—and that the 6000 merks would have remained a burden upon the heir, without relief, had no deed been executed but that in 1747. But the heir contends that the deed 1747 was altered by the deed 1757, and this, as the latest, must determine the *voluntas testatoris*. The rule *quod generi per speciem derogatur* is a general rule, liable to exceptions, and which must yield to circumstances. The burdening clause in the deed 1757 deserves to be considered: "My said niece being always bound, &c., to pay all my just debts, and perform every deed I have come under, or may at any time of my life come under, whether gratuitous or onerous." This clause does not merely import that the executrix should be liable to the diligence of the creditors: it goes farther, it takes her bound to perform every deed of the Doctor's. Had Dr Johnston meant to except the obligation as to the 6000 merks, he would have made that exception. The circumstances of the case show that the Doctor did not mean to make such exceptions; for, to say nothing of the extent of his debts, and the value of his succession, matters disputed, it will be observed, that the 6000 merks was made a burden upon the subjects disposed to Mr Thomas Blackwell in 1747. Part of these subjects was converted into cash, and then into an heritable bond for £600 sterling. This was, by the deed 1757, conveyed to Helen Blackwell. How then can it be supposed that the subject, which was sufficient for enabling the heir to clear the burden, should be taken from him, and yet the burden itself still left upon him. Further, when Dr Johnston imposed the burden of £200 upon his heir, payable to Margaret Blackwell, and of £20 sterling annually, payable to Janet Blackwell, he made those sums payable upon the ceasing of all the annuities, and no sooner. This shows that he meant that his heir should only be liable to pay when he had a fund of payment. It is no good answer to say, that if the heir does not incline to pay the burdens, he may repudiate the succession—for the will of a testator must be explained rationally whenever the words will

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admit of such explanation, and it cannot be supposed that Dr Johnston, in instituting an heir, meant to lay him under such burdens as might constrain him to repudiate the succession. Dr Johnston burdened his heir with £200 to Margaret Blackwell, by a deed in 1761. As, in 1757, he had taken every thing from him but the lands charged with a liferent, and with annuities, it cannot be supposed that he still considered his heir as burdened with the further sum of 6000 merks. No argument arises to Helen Blackwell from the particular burdens laid upon her by the deed 1757. Those burdens were not constituted by any former settlement, and consequently no argument, or presumption, can thence arise that a legacy, constituted by a former deed, was not meant to be laid upon her. As, then, the burdening clause in the deed 1757 is conceived in terms sufficiently explicit to subject Helen Blackwell, and as this construction is natural, and most consistent with a rational settlement of the Doctor's estate, the 6000 merks must be paid by Helen Blackwell, who has funds for paying it; not by the heir, who has none.

On the 7th July 1764, the Lord Auchinleck, Ordinary, "found the defender, Mr Blackwell, as representing the deceased Mr Thomas Blackwell, and claiming under the defunct's disposition to the said Mr Thomas of his land estate, and the land estate itself, is subjected to relieve Helen Blackwell, the executrix, of the 6000 merks provided to Christian Hay, and the interest thereof, and decerned and declared accordingly."

On the 26th February 1765, the Lord Ordinary "found, that, as the deceased Dr Johnston had it in his power to charge any part of his estate he thought fit with his debts, he did in this case, by the terms of the disposition to Mr Thomas Blackwell, sufficiently declare his intention that the fee of his land estate thereby conveyed, and the dispositive to it, should be ultimately liable for the 6000 merks, and interest thereof, contained in his bond to Christian Hay, and found the burdening Helen Blackwell with the payment of all his debts, though it gave a security and ready access to his creditors for their payment, does not entitle the heir of Mr Thomas Blackwell to claim relief from her of a debt which the defunct expressly and specially laid upon him."

On the 9th July 1765, the Lord Ordinary "found, that, as Dr Johnston conveyed his land estate to Mr Thomas Blackwell, deceased, and his heirs, declaring the lands should be really burdened with the 6000 merks to Miss Hay, and by no after deed declared his will to disburden the land estate, that the same continues still ultimately to burden the land,—and found that Robert Blackwell, who has right to the land estate, in virtue of the disposition, cannot liberate himself from payment of the aforesaid sum by repudiating the Doctor's disposition made *in liege poustie*, and taking up the estate as heir served to the Doctor."

On the 4th February 1766, the Lords, upon advising petition and answers, "adhered to the Lord Ordinary's interlocutor."

On the 7th March 1766, the Lords "found that Helen Blackwell, the executrix, is not entitled to relief out of the land estate, of the 6000 merks payable to Christian Hay; and remitted to the Lord Ordinary to proceed accordingly."

On the 24th July 1766, the Lords adhered.

For Helen Blackwell, A. Wight. A. Lockhart.

For Robert Blackwell, T. Montgomery. R. M'Queen.

OPINIONS.

The Court gave its opinion at great length when the cause was first advised, so that the opinions which I had occasion to note were few and short.

COALSTON. This provision of 6000 merks was once a burden upon the heir, by the disposition 1747. I think that the special burden 1747 is not derogated from by the general clause 1757,—but I think that the burden of the annual rent provided to Helen Blackwell must lie upon her.

PITFOUR. An alteration by the deed 1757: the lands were burdened with the 6000 merks—but if any burden imposed, it was taken off by the deed 1757.

KENNET. This case is different from any mentioned in the papers. The burdening clause, by the deed 1757, is sufficiently extensive.

Diss. Auchinleck, Coalston, Stonefield, Hailes. Non liquet, Strichen.

1766. *July 24.* **RODERICK MACLEOD** of Cadboll, **HUGH ROSE**, Younger of Aitroch, **WILLIAM FRASER** of Ardoch, and **JAMES CRAWFURD**, Writer in Edinburgh, all standing upon the roll of Freeholders for the County of Cromarty, *against* **LEONARD URQUHART**, Writer to the Signet.

MEMBER OF PARLIAMENT.

A Complaint under the 16th of Geo. II. for striking a freeholder off the roll cannot, after the death of the original complainer, be awakened and insisted in by other freeholders, whose names did not appear at the original complaint.

THE question between the parties above mentioned, resolved into this, “Whether a complaint, brought in virtue of the statute, 16th George II. for striking off the roll of freeholders a person wrongfully enrolled, can, after the death of the original complainer, be awakened and insisted in by other freeholders, whose names did not appear at the original complaint.”

By an Act 16th George II., entitled “an Act to explain and amend the Laws touching Elections,” it was provided, “that it shall be lawful for any freeholder, standing upon the roll, to object to the title of any person who stands at present upon the roll last made up; and, for that purpose, at any time before the first day of December, which shall be in the year 1748, by summary complaint to the Court of Session, who shall grant a warrant for summoning such persons, upon thirty days’ notice, to answer, and shall proceed in a summary way to hear and determine upon such complaint; and, if no such complaint shall be exhibited within the time aforesaid, then and in that case no

freeholder, who at present stands on the rolls last made up, shall be struck off, or left out of the roll, except upon sufficient objections arising from the alteration of that right or title in respect of which he was enrolled, sustained by the other freeholders standing upon said roll."

Upon the authority of this clause, Sir James Mackenzie of Roystoun, upon the 28th June 1743, offered a petition and complaint objecting to the titles of all the freeholders on the roll, excepting himself and Roderick M'Leod of Cadboll. Leonard Urquhart was one of the persons against whose titles this objection was offered. Some proceedings upon this complaint were had in the Winter Session 1743 and Summer Session 1744, but they related principally to preliminaries; so that, during the period aforesaid, no judgment upon the merits of the question either was or could be pronounced during the vacation which ensued after the Summer Session 1744. Sir James Mackenzie died; and the cause lay over. In 1753 a further objection against such of the original respondents as still remained upon the roll, was moved by Cadboll, a freeholder on the roll, and by Thomas Mackenzie of Highfield, then a claimant to be admitted on the roll. But the freeholders did not meet at the Michaelmas Head-court; and the Lords of Session, when applied to for redress, found that they had no power to interpose, and therefore, on the 20th December 1753, "dismissed the complaint as incompetent." From that time until 1765 no Michaelmas head-court was held in the county of Cromarty; but, when that Court was held at Michaelmas 1765, a procurator for Cadboll gave in a written objection against Leonard Urquhart, founded on the reasons formerly alleged. To this it was ANSWERED,—“that the objection could not be received, as it had not been lodged two calendar months previous to the meeting.” Leonard Urquhart was continued upon the roll. Cadboll insisted in a wakening of his original complaint: the other pursuers, now put upon the roll by authority of the Court, joined with him in a petition and complaint, praying that the Court would resume the complaint 1743 against Leonard Urquhart, find that he had no right to stand on the roll, and grant warrant for his being expunged. The question was, how Cadboll, who was a freeholder in 1743, but did not make the complaint, and how the others, who were not freeholders then, but are now, can be received to awaken the old complaint? They endeavoured to obviate this by pleading in manner following:—

ARGUMENT FOR THE PURSUER:—

“In 1743 Cadboll was a freeholder on the roll, and, although the complaint was not brought in his name, yet he was interested in its issue: being still on the roll, he has an interest to revive and carry it on. Sir James Mackenzie, the original complainer, is dead: The complaint cannot be revived by his heirs. Unless, then, it be competent to be revived by Cadboll, or some other of the freeholders, Leonard Urquhart, not qualified, and objected to, will remain on the roll. By the Act 16th Geo. II. “any freeholder standing upon the roll” may object. The right of objecting then is given to freeholders *qua* such: a complaint brought by one is to be understood as brought in name of himself and brethren: to bring separate complaints at the instance of each freeholder, who apprehends that the majority has done wrong, would be useless. The freeholders, who see a complaint made, desist from entering separate complaints; and therefore it would be contrary to their intentions were the death of the particular complainer to terminate the complaint. If the com-

plainer should die, it is apprehended that his heir, being a freeholder, might insist in the complaint: he cannot insist as heir: therefore he must insist as freeholder, and that is the title of the pursuers. Were this not to be held as a sufficient title, it would be in the power of any freeholder to bring a collusive complaint and not insist in it, or suffer the person complained upon to protract the determination of the cause by any objections however frivolous: for if the complaint, being once brought in his name, becomes his own cause, he may manage it as he pleases. A case similar to the present one, as to the right of complaining, was determined by the Court in 1765: *Colonel Sinclair and Sutherland of Sibberscross* claimed to be enrolled among the freeholders of Sutherland at Michaelmas 1758. Colonel Mackay of Bighouse objected, and the objection was sustained. Colonel Sinclair and Sibberscross complained: the complaint was served against Bighouse only, who made the objection: the case went on till May 1759: no final judgment was pronounced: neither party insisted for a judgment. At length the complainer, in December 1764, petitioned to have the cause determined: the counsel for Bighouse withdrew his objection, and consented to the complainers being enrolled. The Court, however, thought that the objection could not be passed from without an express authority from the freeholders; and, therefore, on the 17th January 1765, they directed the Sheriff of Sutherland to call a meeting of the freeholders, and to lay the petition, &c. before them, and allowed any party concerned, who shall think fit, to give in answers to the petition. The Sheriff reported that the freeholders, so called, "did unanimously declare it as their opinion and resolution, that the enrolment should not be opposed." In consequence, the Court appointed Colonel Sinclair and Sibberscross to be enrolled. It would seem that the judgment of the Court applies to the present case. The complainers are parties concerned, for Cadboll has been all along upon the roll, and the others now are; and they may take up the complaint in the same manner as any freeholder in Sutherland might have taken up the objection to Colonel Sinclair and Sibberscross, and the defence of that meeting which refused to enrol them. There is no objection to the competency, from the lapse of time since 1743, for all actions, once raised, in whatever form, must subsist for 40 years, unless a shorter prescription has been expressly introduced. The Act 16th Geo. II. introduces no such prescription; the action therefore subsists.

ARGUMENT FOR THE DEFENDER:—

No action can be carried on unless by him who raised it, or his representative: it matters not whether this action be advised in its course or summarily: whatever name it bears, it is still an action. The complainer, Sir James Mackenzie, is dead—it is confessed that his heir cannot insist; the action therefore falls. Had the legislature meant to allow summary complaints to subsist for 40 years, at the instance of every freeholder, as well as of the original complainer, it would have so provided. The case of the freeholders of Sutherland is not in point. Colonel Sinclair and Sibberscross were refused by a vote of the Michaelmas meeting: this therefore was the act and deed of the whole freeholders: the objection being moved by Colonel Mackay, the complaint was, in terms of law, directed against him; but all the freeholders had a title to support the objection, their own deed. But here no person complained but Sir James Mackenzie: The others must be supposed to have acquiesced in the judg-

ment of the freeholders ;—but further, this complaint comes too late. It is true that the Act, 16th George II., has introduced no particular period at which a complaint, once moved, and not insisted in, must be held as prescribed. But it will be observed that, since the original complaint, more than twenty years have elapsed : during all that time the complaint has been abandoned, and the defender has stood upon the roll, voted at elections without challenge, and enjoyed every privilege belonging to a freeholder. Such a dereliction on the one hand, and such a possession on the other, must imply an acquiescence on the part of all the freeholders. Many complaints were brought immediately after the Act 16th George II. Many of them remain undecided : there are no fewer than twenty such in one office out of the three belonging to the Court of Session, and yet this is the single complaint which has been sought to be revived. This of itself shows the sense of the nation, as to the incompetency of reviving such complaints after a taciturnity of more than twenty years.

On the 24th July, 1766, the Lords “ found the complaint not competent.”
Act. J. Campbell. *Alt.* R. Blair. A. Lockhart.

OPINIONS.

AUCHINLECK. A summary complaint is not to be awakened after a silence of twenty years : besides, it is not competent for one freeholder to take up another's complaint. In the case of Bighouse the Court allowed every freeholder to defend the judgment which the meeting of freeholders had given.

KAIMES. *Summarily* means *quoad* the Court ; a neglect in insisting will not imply negative prescription. I do not think that one freeholder, by complaining, will prevent another from taking it up. It is still competent to Cadboll to object. There was a complaint. Here is a *casus incogitatus* by the death of the complainer.

AUCHINLECK. Suppose one man only should be displeased, and complain, and afterwards should drop the complaint, and that upon a political change, one of the freeholders who enrolled, should seek to take up the complaint ; would he be permitted ?

PITFOUR. In 1753 a new complaint was exhibited against Leonard Urquhart : this implies that the original complaint had been departed from.

KENNET. There has been a long delay, but the complaint still competent.

ALEMORE. We must adhere to the statute. Formerly the whole freeholders, dissatisfied, might have complained : Now—one allowed to complain. If the freeholders trusted to the life of one man by suffering his single complaint to be lodged in Court, and the man dies, there is no remedy.

COALSTON. Before the statute 16th Geo. II., an action was competent to all the freeholders ; since, an action competent at the instance of one, but still for the behoof of the whole. It is not in the power of any freeholder to depart from his complaint. I believe that complaints have been taken up after the death of the complainer. Taciturnity is nothing.

upon this ground, That the bond was a gratuitous deed, granted by her father, when insolvent, to Williamson his son-in-law, to the prejudice of her prior debt, and therefore reducible on the first branch of the Act 1621. No appearance was made for Williamson's representatives ; but Livingstone, as in right of the bond, pleaded defences.

The Lord Alemore, Ordinary, on the 20th July 1762, found, "that the bond, being *inter conjunctos*, is reducible upon the Act 1621, unless the defender shall astruct the onerous cause thereof."

The cause being afterwards remitted to Lord Barjarg, he, on the 12th July 1763, "adhered to Lord Alemore's interlocutor ; and, in respect the defender did not offer to astruct the bond, reduced the same and infestment following thereon."

Livingstone, in a reclaiming petition, craved the Court to find that the reduction on the first branch of the Act 1621, is not competent against him, an onerous creditor-adjudger of the bond ; or at least, that he is not farther bound to instruct the onerous cause of the bond, but that the pursuer is bound, in support of her challenge, to prove that the granter of the bond was insolvent, and that the bond was gratuitous.

The Lords appointed a hearing upon the point, Whether this action was competent against an onerous creditor-adjudger ?

On the 16th December 1763, after the hearing, they pronounced the following interlocutor : "Repel the defence, that adjudgers from a conjunct and confident person are not liable to the challenge arising from the Act of Parliament 1621 ; but, in respect of the particular circumstances of this case, find that the defender is not obliged to astruct the heritable bond in question ; and remit to the Lord Ordinary to proceed accordingly."

Before the Ordinary the pursuer gave in her condescendence, and the defender made answers to it, wherein he pleaded that the facts condescended on were irrelevant, and also that the mean of proof by witnesses was incompetent.

The Lord Ordinary appointed Williamson's account-book to be produced ; and it was accordingly recovered in a mangled condition, as having been used for waste paper. On the 18th January 1766, the Lord Barjarg, Ordinary, pronounced the following interlocutor : "In regard that the Lords have found the bond in question reducible upon the Act 1621, but, in respect of the particular circumstances of the case, have found that the creditors were not obliged to astruct the said bond ; therefore finds that it is competent to the pursuer, Janet Gibb, to astruct, by facts and circumstances, the grounds of her reduction : and allow her to prove, both by witnesses and writings, the several facts mentioned in her condescendence ; as also the particular facts contained in her memorial relative to the account-book produced : allows the defender a conjunct proof," &c.

On the 26th February 1766, the Lord Ordinary adhered to this interlocutor.

The defender gave in a reclaiming petition.

ARGUMENT FOR THE DEFENDER :—

The Lord Ordinary seems to have allowed a proof by witnesses, in regard the Court had found that the defender was not obliged to astruct the onerous cause of the bond ; but this consequence does not follow : in the former proceedings the nature of the proof was never the subject of consideration. By the judgment of the Court the defender was relieved of the *onus probandi* ; and it became

incumbent on the pursuer either to give up her objection or to prove it in a habile manner. What that manner is shall now be stated. Anciently, when writing was little used, most points were probable by witnesses, but this was altered when writing came to be generally used. It is now a rule, that, in all contracts where writing is either essential to their constitution, as in the transference of land rights, or usually adhibited, as in the borrowing of money, there the testimony of witnesses is rejected. It is also a rule that no debt or right once constituted by writing can be taken away by witnesses. This rule, however, admits of an exception. A written obligation may be taken away by witnesses, upon proof of circumstances inferring fraud or circumvention used against the grantor of the obligation. This is from the necessity of the thing, and because a deed so obtained does truly want consent on the part of the grantor. See Dictionary, vol. 2, p. 219-220. Thus the Lords refused to examine, *ex officio*, the writer and subscribing witnesses, touching the true cause of a bond, that, this being proved, the bond might be declared null, *causa data causa non secuta*; for they considered that, whatever might be the case where the writing bore onerous causes in general, yet, when it bears borrowed money, it cannot be set aside save only *scripto vel juramento* of the creditor;—Fountainhall, 19th June 1696, *Bruce* against *Murray*. And the same was also found, 2d January 1760, *Hart* against *Pringle*. It remains now to consider whether the nature of the present challenge on the Act, 1621, makes any variation as to the mean of proof. By that Act the mean of proof is pointed out to be by writ or by oath of the party receiver of any security, &c. And indeed this is agreeable not only to the principles of law, but to the reason of the thing; for, when a bond bears to be for money, it is scarcely possible that the negative, of the money not being received, can be proved otherwise than by writing or oath of party. The Court, indeed, has so far departed from the strict rule of the statute, as to lay the proof of astructing the onerosity upon the conjunct or confident person, especially where the cause of granting is expressed in general terms for onerous causes. That however does not infer an alteration in the statute as to the mean of proof, when the *onus probandi* is found, as here, to lie upon the objector. Neither will it vary the case, that the Court has found the bond reducible upon the Act 1621, whereby the common rules of law, with respect to the evidence for setting aside written obligations, may be supposed to go for nothing, and the narrative as *inter conjunctos* may be supposed not to prove; for that the interlocutor does not relate to this particular bond, but to the general abstract question; and the subsequent part of the interlocutor limits the effect of the challenge by declaring the adjudger not liable to astruct the bond. The supposed circumstances of the grantor's insolvency, and of the bonds being *inter conjunctos*, have consequently no more effect than to afford a ground of reduction upon the pursuer's proving the bond gratuitous, which would not otherwise be relevant for setting it aside. But still the common rule of law, and the words of the statute, must determine what evidence is to be admitted for proving that objection. Were the narrative to go for nothing, then the defender would have no benefit by the latter part of the interlocutor, and the pursuer would have no occasion for proving any thing in order to redargue the narrative: this is a proposition which cannot be maintained. The nature of the evidence competent to the creditor for astructing the onerous cause can be no rule

for what is competent to the challenger for disproving it. Adminicles may support a deed, but full evidence is required to overturn it. That Williamson is dead, whereby the benefit of his oath is lost, cannot vary the case. The pursuer has herself to blame for not bringing the challenge till after his death. .

ARGUMENT FOR THE PURSUER :

If a proof by witnesses be not allowed, the consequence will be, that, in a case such as this, no proof can be given of the gratuitousness of the transaction. Williamson, the receiver of the bond, is dead, so no proof can be had by his oath; and, had he been alive, the defender might, in the character of an onerous assignee, have objected to his oath. As to a proof by writing, that is not to be expected when parties make a transaction like the present one, for disappointing just creditors. When the Court found that the reduction was competent against the adjudger, it meant to find something in favour of the pursuer. The meaning of the latter part of the interlocutor was to transfer the *onus probandi* from the defender to the pursuer; but the Court did not mean to make that *onus* heavier on the pursuer than it would have been on the defender; and, therefore, as the defender might have proved onerous by witnesses, so may the pursuer gratuitous. The decisions for proving that writing may not be taken away by witnesses do not apply. The rule applies not to fraud, which, being of a criminal nature, must be proved by witnesses. Had the granter been induced through fraud to grant the bond, it might have been set aside; why not, when, as it is contended, the bond was fraudulently granted. It matters not whether Gibb was deceived or meant to deceive: the proof in both cases must be of the same nature. The words of the statute 1621, do not mean that only writing or oath of party shall be admitted as evidence; it does no more than point out those as means of proof, without excluding others. Besides, there is in this case some evidence in writing, viz. Williamson's account book, in which he states himself as creditor to Gibb for some small sums, amounting to L.8 sterling, but says nothing of his being any further a creditor to him. So that the pursuer may be considered as seeking to complete her evidence by witnesses, which is begun by writing.

On the 25th July "the Lords adhered."

The Court was much divided, but I omitted to take down the names of the *dissentients*.

OPINIONS.

COALSTON. In reductions on the Act 1621 practice has made a distinction between deeds granted to strangers and to conjunct and confident persons. In the *last* the onerous cause must be astructed: but here the question is not with Williamson, the confident person, but with an adjudger,—and he has been found not obliged to astruct the onerous cause. The pursuer then must disprove the narrative of the deed, as with a stranger,—he must therefore disprove it by writ, or oath of party.

KAIMES. Livingston is as a stranger; but, if a bankrupt grants a bond of all that he has to a stranger, and this must be proved by writ, adieu to the bankrupt Acts.

KENNET. Purchasers nowise partakers of the fraud are safe ; but Livingston is not a purchaser. The *onus probandi* on the objector, and he may cut down the bond by the same evidence that might have been used to astruct it.

1766. July 30. JAMES MACKELL in Trochiehouse *against* The OTHER CREDITORS of ANTHONY M'CLURG in Craignell.

BANKRUPT.

Where the case of an Insolvent Debtor does not fall under the Acts 1621 or 1696, a trust-disposition granted by him for behoof of his whole creditors, found effectual.

[*Sel. Dec. No. 249 ; Dictionary, 894.*]

IN December 1762, Anthony M'Clurg in Craignell became bankrupt. Most of his creditors granted him a *supersedere*, on a narrative that they and he had chosen certain trustees for the management and disposal of his stock, tack, and other moveables. To this deed M'Kell, a creditor of M'Clurg in L.51, is no party. On the 8th February 1763, the bankrupt, in prosecution of this plan, granted a trust-disposition to the foresaid trustees. M'Kell obtained decret against M'Clurg for the L.51 sterling, and arrested in the hands of one M'Clamerock : he also obtained decret of forthcoming against M'Clamerock, as debtor to M'Clurg. M'Clamerock suspended, and pleaded that he owed nothing to M'Clurg, but that he had bought goods from the trustees of M'Clurg, which had belonged to him, and, on delivery, became bound to pay the price to them. M'Clamerock also raised a multiplepoinding, wherein he called both M'Kell and the trustees, to dispute their preferences.

ARGUMENT FOR M'KELL, THE CHARGER:—

The validity of trust-dispositions, like the present, has been often under consideration of the Court. In the case of *Snee against The Trustees of Anderson, 12th July* —, the Court set aside a trust-disposition from a bankrupt—and found “that no disposition by a bankrupt debtor can disable creditors from doing diligence.” See *Dictionary, Vol. I. p. 85*. The like judgment was pronounced *Earl of Aberdeen against The Trustees of Blair ; 3d February 1736*. The general point was again solemnly decided in 1765, *Moodie against The Trustees of Strachan*. This decision proceeded not on the specialty that Strachan was bankrupt in terms of the Act 1696, but was pronounced upon the general principles established in the case of *Snee*. As, therefore, the charger did not accede to the trust-disposition, he cannot be thereby precluded from doing diligence and effectuating payment.

ARGUMENT FOR THE TRUSTEES OF M'CLURG, appearing in the multiplepoinding:—

The disposition in question is not liable to any challenge, either at common law or upon statute. At common law, total alienations made to particular creditors, in prejudice of others, are reducible ; but here the alienation is made

for behoof of the whole creditors. The statute 1696 can have no place here ; for M'Clurg, the insolvent, was never a notour bankrupt, in terms of the statute. Neither can the statute 1621 have place here. The disposition does not fall under the first clause, for there is no gratuitous alienation in defraud of creditors ; nor under the second, for M'Kell had done no diligence. The decisions then quoted for M'Kell are foreign to the cause : in all of these cases the debtors had become bankrupt, in terms of the statute 1696. The Court has never found that *all* dispositions granted by a person insolvent for the behoof of *all* his creditors are reducible : nor has the Court found that the effects of the bankrupt, when converted into money by the trustees, are affectable by creditors not acceding to the trust-right. A person, who is not a notour bankrupt, and whose creditors are not in course of diligence, may deliver part of his effects, *in solutum*, to any of his creditors at an adequate price : he may also convert his effects into cash, and pay off as many creditors as he can. If his whole effects consist in bills, he may indorse those bills to his creditors, when, as here, the statutes 1621 and 1696 lay him under no disability. Such being the case, why may he not assign over all his effects to trustees for the benefit of his whole creditors ? Although it should be admitted, that creditors not acceding may do diligence, yet this will not benefit the charger, for that such diligence can never go farther than to affect the share allotted to them by the trust-right. With respect to the shares allotted to the acceding creditors, the property is transferred to them as soon as it is vested in their trustee. Such is the case here, and the charger may draw his share, either under his arrestment or under the trust-right, as he thinks best.

On the 25th February 1766, the Lord Kaimes, Ordinary, " In respect that, when James M'Kell arrested in the hands of Andrew M'Clamerock, as debtor to Anthony M'Clurg, the said Andrew was not debtor to M'Clurg, but to the trustees for his creditors, who sold the stocking to him and took the price payable to themselves for behoof of the creditors,—therefore prefers the trustees to the sums in the hands of the pursuer of the multiplepoinding, and decerns in the preference, and against the pursuer for payment accordingly."

On the 18th June 1766, the Lord Ordinary " adhered, reserving reduction of the trust-right as accords."

On the 30th July 1766, the Lords, upon advising petition and answers, " adhered."

For the charger, J. M'Claurin. *Alt.* G. Wallace.

OPINIONS.

KAIMES. I only determined upon the rights as they stood, reserving reduction.

PITFOUR. An error in point of law on the part of the petitioner. Although a reduction of an equal disposition by a bankrupt be allowed, that has no relation to the Acts 1621 and 1696. A person not a bankrupt may divide his funds among his creditors. So it was determined, *November 1744*, in the case of *Bert's Creditors*. As to the case of *Moodie*, it went entirely upon the Act 1696, although the charger says otherwise.

DECISIONS REPORTED BY
of Calderwood, against ROBERT
Town, &c.

SIR WILLIAM
STRANG, &C. Portion
THIRLAGE.
The clause of "Use and Went," interpreted by possession.
Dec. No. 246 ; Dictionary, 16,057.]
of the lands of Jacktown
of the following ten
struendo, in
struendo

When lands are astricted to a mill, the teinds thereof are not comprehended, unless those teinds either belong to the heritors or the proprietors of the mill prior to the astriction. The reason is, that no person can be understood to astrict to a mill what does not belong to himself, and over which he has no power. Hence Lord Stair says, B. 2, tit. 7, § 17, "Thirlage of lands to another man's mill doth not infer a thirlage of these lands, though acquired by the heritor who thirled against *Hamiltons*, where it was so found. Upon the same principles it was determined, 18th November 1697, *Garden against Watson Laird of Innerwick* against *Fountainhall*: There, in a thirlage of *omnia grana crescentia*, d. observed having been sought for teind, was allowed, as the right of teind was deduction having been sought in two cases, teinds were found to be a deduction from the heritor's person: and, in two cases, teinds were found to be a deduction from distinguishing whether they belonged to the owners of the land.

astricted or not. Durie, 21st March 1697, *Cuthbert against The Town of Inverness*: and Stair, 7th June 1676, *Pittarrow against Stewart*. In the present case, the College of Glasgow has right to the teinds, and may draw yearly the tenth sheaf; and therefore Sir William Maxwell cannot demand the multure of that teind. No transaction between the predecessors of the vassals and the superior could impose a servitude upon the fruits of the ground, in so far as those fruits did not belong to them; and as no deed of theirs could astrict the teind, so neither can it be presumed that any such thing was intended by the parties. Teinds are a *separatum tenementum* distinct from the stock; and, therefore, when Sir William's predecessors feued out the stock, and astricted the vassals at the same time to his mill, the astriction must be held to be of the tenement feued out, namely, the stock. To suppose that the teind was thirled while possessed by the vassal, and yet that it was free whenever levied by the titular, is to suppose an astriction in favour of the superior which yet depends totally on the will of a third party, the titular. Nothing but an express agreement can create a right so anomalous, and there is here no such agreement. In such case, usage will signify nothing; for, if the teind is a subject not thirled, the going to the superior's mill will be *res meræ facultatis*, whereby no right can be established. Were the titular to draw the teinds, there could be no demand of thirlage: by selling the teind, they would not make it liable in thirlage: and, whether they draw it and then sell it, or make an annual bargain with the heritors instead of drawing and selling it, the case is still the same.

ARGUMENT FOR THE SUPERIOR:—

Although the teind itself could not be thirled to the prejudice of the College, yet the possession of the teind, while in the vassals, might be thirled: and this thirlage would subsist as long as their intromission subsisted. A thirlage constituted of *omnia grana crescentia* properly comprehends all sort of corn, seed and horse corn, and teind not excepted. But, were a person sued for the multure of those, he would have this plea in equity, That it could not have been the intention of the parties to astrict seed corn necessary for sowing the ground; horse corn, required for the use of the horses on the ground; and teind deliverable to the titular: for this would be in effect to demand impossibilities. But if one should neither sow corn, nor keep horses, nor deliver teind to the titular, the case would alter: the obligation implied in the general clause would become prestable, and, as the whole corn might be brought to the mill, the whole would be considered as thirled. The argument, that no person can be presumed to astrict to a mill what belongs not to himself, does not apply. It supposes that the astriction is the act of the vassal; whereas that is the act of the superior, being the condition of his grant to the vassal: Besides, why may not one astrict his possession? This was all that has been done in the present case, and the uninterrupted practice explains it to have been done. Neither does it vary the case, that, according to the superior's argument, the teind might at one time be thirled, and at another time not, as possessed by the vassal or by the titular; for even a thirlage of the stock may fluctuate, and cease or revive by turns. Thus, if a vassal thirls his lands to another's mill, whenever the fee opens to the superior in consequence of ward or non-entry, the thirlage ceases, but will

revive whenever the vassal is reinstated; 11th December 1666, *Earl of Cassilis* against *The Tenants of Dalmorton*. Thus, again, a wadsetter may thirle the lands wadset, during his possession, but upon redemption they will become free: the same is the case as to liferenters and tenants. As the tacksman of lands may thirle his corn, so may a tacksman of teinds thirle his possession of the teind. Had the vassals a tack of their teinds, they might have thirled them while possessed under the tack; nor does it make any difference whether they have a tack or not, so long as they possess. The case might be attended with more difficulty were the vassals hereafter to acquire a right to the titularity of their teinds; for then they might plead that they could not be presumed to have astricted a right which was not in them at the time. That, however, can never be a question between the parties; for the vassals can never purchase College teinds. The decision, 7th July 1635, *Hamilton of Innerwick*, is not in point; for, there, the practice had been either to draw the teind or to allow a deduction from the thirlage on account of it. The superior, in support of his proposition, urges the following decisions:—*Harcus, voce Multure, No. 723*, “where the teind, if not drawn, or paid *ipsis corporibus* to the titular or tacksman, but in money, was found liable to multure, as their stock;” and *Stair, 21st January 1681, Grierson* against *Gordon*,—where it was offered to be proved that the whole grain growing on the defender’s land, without any abatement for teind, paid multure; and the Lords found this plea relevant.

On the 1st August 1765, the Lords found, “that, as the teind, payable to the College of Glasgow, is payable in rental bolls of meal, therefore that the oats for said meal must be grounded at the pursuer’s mill, and that the same is liable to pay intown multure.”

On the 27th November 1765, the Lords found “that the teinds of the vassal’s lands are not astricted to the superior’s mill.

On the 26th June 1766, the Lords found “that the vassals are not entitled to any deduction from their thirlage to the superior’s mill on account of the teind, and remitted to the Lord Ordinary to proceed accordingly.”

On the 30th July 1766, they finally adhered to the last interlocutor.

For *Sir William Maxwell, A. Lockhart. Alt. A. Wight.*

OPINIONS.

AUCHINLECK. Lands and teinds, two separate estates. I do not understand a thirlage which is ambulatory. An heritor cannot astrict what he does not give.

KAIMES. I argue on the principle that servitudes are established *patientia et usu*. Thus *servitus itineris* is upon a presumed agreement. The thirlage here is of grinding at the superior’s mill what corn the vassals have occasion to grind, and they have been in use to bring their teind.

PITFOUR. A mistake to suppose that thirlage must be perpetual. When teinds were drawn by churchmen before the Reformation, there could be no thirlage of teind. Suppose the heritor should have a tack of teinds, why may he not thirle his possession?

not found caution, the hospital thereby suffered a considerable loss. This made the magistrates come to a resolution of dismissing the treasurers of all the hospitals, whereof they had the administration, unless such treasurers found caution. This resolution having been intimated to George Pitcairne, he, on the 29th February 1764, proposed to find caution for his intromissions as treasurer of the Trinity Hospital, to the extent of £400, and he proposed Mr Gardiner for his cautioner. The proposal was accepted. Accordingly, on the 3d April 1764, a bond was made out, and signed by Pitcairne and Gardiner. It begins in the name of George Pitcairne: It recites his having been appointed treasurer to the hospital, and his having proposed to give bond by himself and Mr Gardiner: that the Magistrates and Council had approved of the proposal, and that they had enacted, that, in all time hereafter, "the treasurer of the hospital, for the time being, shall, within three months after his being elected, find caution to the satisfaction of the Magistrates: therefore, I, as principal, and with and for me as cautioner, the said Robert Gardiner, do hereby bind ourselves conjunctly and severally, &c. that the said George Pitcairne shall make just compt of the revenue of the said hospital, so far as the same shall be intromitted with by me, and to pay over the same, &c.; and that I shall lodge all the vouchers of my several receipts and payments, within three months after the term of Martinmas, annually, during my continuance in office. And we, jointly and severally, oblige us to make good all deficiencies, to the extent of L.400 sterling, attour performance." It does not appear that, at the time of Pitcairne making the proposal of signing the bond, any thing was expressly provided as to finding caution for payment of the arrears. A few weeks after the granting of this bond, Pitcairne became bankrupt. Upon examination of his accounts it did appear that he stood indebted to the hospital in L.447 sterling, mostly incurred before caution had been found. The magistrates of Edinburgh threatened an action against Gardiner, for payment of the L.400 sterling, contained in his cautionary obligation. Upon this, Gardiner brought suspension of a supposed charge: his reasons of suspension were discussed summarily upon the bill.

ARGUMENT FOR THE SUSPENDER:—

The question is, Whether, in terms of the bond, the suspender is liable for all the arrears incurred by Pitcairne from the commencement of his office, or only for his arrears incurred from the date of his cautionary obligation. Whenever one obliges himself that another shall faithfully administrate an office, the obligation must be presumed to respect the administrating in time to come, unless the contrary is expressed; for this, on the part of the cautioner, is an obligation *ad factum præstandum*, not for payment of a debt. Thus, if a person continue long in one office, he may have different cautioners bound for him as to different periods; but the cautioner who acceded last will not be bound for the administration during prior periods, when there were other cautioners. A cautionary obligation is in its nature *stricti juris*, and not to be extended by implication. As it is to be presumed that an obligation to become cautioner for one already in office, must respect future intromissions, it is incumbent on the magistrates to point out the clause whereby such obligation is entered into. If such clause cannot be pointed out, then the legal construction of cautionary obliga-

tions, and the natural presumption arising from the fact, must take place. Had the magistrates meant to include an obligation for arrears, they would have inserted it in the bond. This they did not do; but, on the contrary, the words used are, "As the same shall be intromitted with by me;" plainly referring to the time to come. The words, "to make good all deficiencies," must be explained in consistency with the former clause, which relates to what *shall* be intromitted with; for the obligation to make up deficiencies can never extend beyond the obligation to hold count and reckoning; and, if the latter respects the future, so must the former. Besides, were all deficiencies explained in a wide sense, then it would extend to a larger sum than L.400 sterling; for Pitcairne might have intromitted with more than L.400: but this is contrary to the express obligation in the bond, and consequently cannot be the true meaning of the phrase. Besides, according to this construction, had Pitcairne been removed by the magistrates on the day after the suspender became cautioner for him, the suspender would have been liable to the extent of L.400, and, at the same time, conferred no favour on his friend Pitcairne. This shows that the intention of the cautionry was to continue Pitcairne in his office, and that the faithful administration of that office in time to come was the thing in view of the parties.

ARGUMENT FOR THE CHARGERS:—

The object in view was that of securing the hospital. It would have been absurd to have limited this security to intromissions which might be after the date of the bond, for this might have involved the chargers in a question with the cautioner as to the dates of the intromissions. The Act of Council, which provides that the treasurer shall find caution within three weeks of his election, points out that intromissions prior to the bond of cautionry were comprehended; for it could never have been the intention of parties that no security should be given for the treasurer's intromissions during the first three weeks of his office. The proposal of Gardiner, as cautioner, was made and accepted on the 29th February 1764: the bond was not signed till the 9th March 1764. The suspender might with equal justice maintain that he was not liable for intromissions during the interval: but this he cannot do; and therefore his argument is defective. The narrative of the bond, which mentions the time of Pitcairne's election to the office, shows that bygones were in the view of the parties. Had Gardiner refused to become cautioner to the extent that the chargers say he did, it is obvious that Pitcairne would have been displaced from his office.—As this was the thing which Gardiner meant to prevent, the words of the obligation must be interpreted against him. But indeed the words are not ambiguous. The commentary on the word *shall* is not sufficient to remove the force of the obligation as to all deficiencies. This bond is not merely *ad factum præstandum*; the principal part of the bond is to pay what shall be due; the obligation to account, or *ad factum præstandum*, is only an accessory for ascertaining what shall be due. Were different cautioners to become bound at different times, as in the case suggested by the suspender, there would be no impropriety in holding them all bound *in solidum*. Of this they could not complain; for they might have taken care to ascertain the precise periods during which they were to be bound.

On the 16th July 1766, the Lords found the letters orderly proceeded, ad-

hering to Lord Strichen's interlocutors of December 18, 1765, and February 15, 1766.

On the 1st August 1766, the Lords refused a reclaiming petition, and adhered. *Act. J. Montgomery. Alt. R. Blair, A. Lockhart.*

OPINIONS.

PITFOUR. The cautionary obligation extends to all intromissions, without distinguishing prior from posterior.

COALSTON. Cautionary obligations are not to be extended.

AUCHINLECK. The narrative of the bond mentions the date of Pitcairne's commission. This unnecessary, if the bond related solely to what he was afterwards to receive.

KAIMES. The general rule, that cautionary obligations are not to be extended, may be departed from according to circumstances; but, here, there are no such circumstances. Here, caution was taken for the first time: What title had the magistrates to exact caution for bygones? *Actus non operantur ultra intentionem*: And there are no circumstances here to extend that intention to bygones, unless it be said that the *res gesta* was, that Pitcairne was to be turned out unless he found caution for bygones, and that upon this account Gardiner became cautioner.

GARDENSTON. It is most rational to suppose that caution was only meant to be exacted for the future: if otherwise, Why was there no mention of arrears? A cautionary obligation is a *literarum obligatio*, not to be extended beyond its tenor. This he illustrated from various Acts of Sederunt respecting cautioners in suspensions. *Trades of the Canongate against Angus. Sir John Douglas.*

BARJARG. The balance could only appear by posterior accounting, so that it is necessary to extend the caution to arrears. Pitcairne, by keeping a balance in his hand, intromitted anew.

JUSTICE-CLERK. Why should Gardiner become caution in L.400 for time to come, and not for time past?

ALEMORE. The words of the obligation comprehend both principal and cautioner alike.

Diss. Coalston, Kaimes, Elliock, Gardenston, Hailes.

1766. August 2. DOROTHEA, COUNTESS FIFE, and her Husband EARL FIFE, for his interest, *against* SIR JOHN SINCLAIR of Stevenson, Baronet.

SUCCESSION.

Nearest Heir-Male of Line Whatsoever.

[*Faculty Collection, IV. 260; Dictionary, 14,944.*]

A competition arose between those parties concerning the succession to the

estate of Caithness, under a disposition from Alexander, the last earl. For understanding the case it is necessary to state the great lines of the genealogies of both the families :

Family of Caithness.

1. Earl Alexander, the
testator, died in 1765,
leaving issue,

2. John, Lord Murkle,
died in 1755, *sans* issue.

3. Francis of Milton,
died in 1762, *sans*
issue.

Lady Dorothea.—Earl Fife
married in 1759.

Family of Stevenson.

1. Sir Robert.

2. John Lockhart,
died 1760, *sans*
male issue.

3. George Lord Woodhall,
died in 1764, *sans* issue.

4. Patrick,
died 1763,
sans issue.

Sir John.

The estate of Caithness was chiefly the acquisition of Alexander Earl of Caithness. His brother, John Sinclair of Murkle, left him his whole estate real and personal. The deed contains this clause : “ I do earnestly recommend to the said noble Earl to bestow a suitable share of my fortune and estate on Lady Dorothea Sinclair, his daughter, my niece, for whom I have the greatest affection and regard, and that at such time and in such manner shall be most proper.” By letter which Lord Murkle wrote on the first of May 1755, a short time before his death, he thus addressed his brother : “ I again make my humble request, that you may settle your estate on her, as well as mine.” It appears that Lord Caithness, immediately after his brother's death, had an intention of making some settlement in favour of Lady Dorothea ; but the execution of this intention was first delayed, and then laid aside altogether.

In 1759, Lady Dorothea was married to Lord M'Duff now Earl of Fife : the marriage was with consent of Lord Caithness : he provided his daughter in no greater fortune than £2000 sterling. Lord Caithness had cultivated a long friendship with George Sinclair of Woodhall, one of the senators of the College of Justice. He was the third brother of the family of Stevenson ; and his relation to Lord Caithness, if any, was very remote. On the 19th May and 17th August 1761, Lord Caithness executed deeds of settlement, whereby he granted procuratory for resigning his lands, “ in favour, and for new infestment of the same to be granted to himself and the heirs-male of his body ; which failing, to his brother, Mr Francis Sinclair, and the heirs-male of his body ; which failing, to the second, third, and other younger sons successively, to be procreated of the marriage between Lady Dorothea Sinclair his daughter, and James Lord M'Duff, and the heirs-male of their bodies ; which failing, to the heirs-male to be procreated of the body of the said Lady Dorothea Sin-

clair of any subsequent marriage; which failing, to George Sinclair of Woodhall, Esq. one of the senators of the College of Justice, and the heirs-male of his body; which failing, to the said George Sinclair his nearest lawful heir-male of line whatsoever: which failing, to his own nearest heirs and assignees whatsoever." The whole heirs are taken bound, under an irritancy, to bear the name, arms, and designation of Sinclair of Murkle, simply, and no other: but from this obligation are exempted the heirs-male of the body of Lord Caithness, Mr Francis Sinclair, and his male issue. All peers are excluded after the failure of the male issue of Mr Francis Sinclair, with whom it is plain that Lord Caithness understood that the title of Caithness would fail in his own branch. By these deeds, a strict entail was established, whereof it is unnecessary to recite the clauses. It appears that Lord Caithness meant to vest his personal estate in the purchase of lands to be taken to the same series of heirs; but his purpose was never carried into execution, whereby the succession to the personal estate, supposed to amount to L.20,000 sterling, devolved to his daughter Lady Dorothea, *ab intestato*. When Lord Caithness died, there remained no brothers of the family of Stevenson of the same generation with Lord Woodhall. Sir John Sinclair of Stevenson, the eldest son of Sir Robert, the eldest of the brothers, purchased brieves to be served heir of tailzie and provision in general to Lord Caithness, upon the deed 17th August 1761. His claim was founded on this, that he was the person designed as heir-male of line whatsoever to Lord Woodhall, and consequently called to the succession, while Lady Dorothea, Countess Fife, had no second son. On the other hand, Countess Fife, apprehending that heir-male of line whatsoever was an unintelligible character, took out brieves for serving herself, in virtue of the next substitution, heir whatsoever of Lord Caithness. The general topic pleaded for her was, that the words "heir-male of line whatsoever" have no meaning in the law of Scotland; that they imply a contradiction; that, if they have a meaning, it is one which does not apply to Sir John Sinclair.

The Lords Barjarg and Coalston, assessors to the macers, took the debate to report.

ARGUMENT FOR SIR JOHN SINCLAIR:—

That there is no such character known in law as heir-male of line whatsoever, is asserted by Lady Fife; but this assertion is erroneous. That Lord Caithness had thereby some person or persons in view, is obvious, for that he calls such heir preferably to his own heirs whatsoever: and, that being the case, the description, however inaccurate, will, *si constet de persona*, have its full effect. Heir-male, and heir-of-line, when opposed to each other, are descriptive of different persons, though heir-male may be also heir-of-line, and heir-of-line heir-male. But, in order to discover what Lord Caithness meant by this description of heir-male of line whatsoever, the situation of the family of Stevenson in 1761 must be attended to. That Lord Woodhall was the *prædilecta persona* is plain: he had two elder brothers, and one younger. The eldest brother was dead, leaving issue Sir John; the next, Mr Lockhart, was also dead, leaving issue daughters only; Peter, the youngest, was alive and a bachelor. In the succession of brothers dying without issue, the law of Scotland allows a double representation in the same degree: the one of heritage, which descends

to the immediate younger brother, the heir of line; the other of conquest, which ascends to the immediate elder brother, the heir of conquest. Thus are they contradistinguished, although, in fact, they are both heirs of line, as taking in the course of legal succession. Hence there is no impropriety in describing the immediate younger brother under the character of heir-male of line, who takes by descent, in opposition to the immediate elder brother who takes by ascent. Thus, then, Sir John Sinclair was Lord Woodhall's heir-male of conquest, as being the eldest son of his only elder brother who had male issue; whereas Peter Sinclair, his immediate younger brother, was his heir-male of line. By using the description "heir-male of line," Lord Caithness determined that Peter should be preferred to Sir John Sinclair. The terms "heir," and "heir whatsoever," are capable of a construction more or less limited from circumstances. That the distinction here pointed out, of heir of line and conquest, is authorised by lawyers, appears from Lord Stair, title, *Succession*, § 53; and Lord Bankton, *B. 3, tit. 4, § 21*.

ARGUMENT FOR LADY FIFE:

The words "heir-male of line whatsoever," have no meaning in the law of Scotland: they imply a contradiction as much as if one were to call the same person under the denomination of heir-male and heir-female. They are words of style unknown to practitioners, and must be held *pro non scriptis*. If, however, they must be understood as having a meaning, Lady Fife will shew that they do not apply to Sir John Sinclair, the heir-male of Lord Woodhall, but that they must apply to a species of heir who is not heir-male simply, nor heir of line simply, but both. Here the word whatsoever, can imply no more than what it generally implies, namely, the collateral heir of Lord Woodhall, in contradistinction to the heir of his body already called. The question then is, What collateral heir of Lord Woodhall is called under the description of his heir-male of line? The testator, using this phrase, could not mean to express either heir-male or heir of line simply. By the law of Scotland, heir-male is a general character: an heir-male, who is likewise heir of line, and one who is not, are its two species: Or, succession may be viewed in another light. An heir of line is a genus whereof there are two species: one an heir-male, *i. e.* a male and connected by males; the other, an heir-female or connected by females. In whatever light the expression of the deed is viewed, the character of heir-male and heir of line cannot be separated. Sir John Sinclair is the heir-male of Lord Woodhall; but the daughters of Mr Lockhart are his heirs of line. If "heir of line" were to be left out, and "heir-male" only retained, why not *vice versa*? And then the daughters of Mr Lockhart might claim in the character of heirs of line to Lord Woodhall, rather than Sir John Sinclair as his heir-male. Had the substitution been to Lord Woodhall's heir-male, being of line, the person having both these characters, and not singly one of them, would have been understood: heirs-male of line imports the same thing, though more briefly expressed. Nor is it unreasonable to suppose that Lord Caithness required the coincidence of both characters in this substitution; for he thereby narrowed the succession among strangers to his family, and made way the sooner for his own heirs whatsoever. Had he meant to call Sir John Sinclair to the prejudice of his own daughter, he might have called him *nomi-*
natim, or under the description of Lord Woodhall's heir-male whatsoever. As

he has not called him under either of those descriptions, it is to be presumed that he did not mean to call him at all. Papinian, *ex Conjectura Pietatis*, supplied a whole branch of a substitution; but such conjecture cannot be admitted in order to disinherit a daughter. It is said, that, under this description, the testator meant to call Peter Sinclair, Lord Woodhall's younger brother, his heir-male of line, but not of conquest. Of this, however, there is no evidence: Besides, the estate, once vested in Lord Woodhall, would have devolved to his heir of line, not of conquest; so that the description of heir-male would have had the same effect. That the terms heir, and heir whatsoever, are sometimes ambiguous, arises only from this, that there are prior settlements to the tenor of which the testator may be supposed to refer; but nothing of this kind here occurs. Be this as it will, the term heir-male is never ambiguous. Lady Fife does not plead that the expression ought to be read heir-male and of line, but that, in its consequence, it comes to be understood of one who is both heir-male and of line. In the same manner, an heir-male, called by a tailie, will be either heir-male of tailie, or heir-male and of tailie.

N.B. In this cause there was an ample production of letters made, in order to show what was the purpose of Lord Caithness in executing this disposition. Lady Fife founded on some letters, to prove that Lord Woodhall prevented Lord Caithness from executing a settlement in her favour. Sir John Sinclair founded on other letters, to show that the deed in controversy was altogether owing to Lord Caithness himself; and that Lord Woodhall procured it to be conceived in a form less prejudicial to Lady Fife's issue than her father himself had intended; that Lord Woodhall, had he seconded Lord Caithness's plan of purchasing land, might have disappointed Lady Fife of the moveable succession, amounting to £.20,000 sterling. The decision of the cause did not however turn upon those particulars: they served only to show violent resentments, much caprice, and some duplicity of conduct in the noble Lord.

On the 2d August 1766, upon report of Lord Barjarg, one of the assessors, "the Lords repelled the objections made by Lady Fife, and ordained the service of Sir John Sinclair to proceed."

For Lady Fife, J. Ferguson, J. Burnet. *Alt.* H. Dundas, A. Lockhart, R. Barjarg.

OPINIONS.

COALSTON. I think that the settlement in question is irrational, as made in favour of a stranger, to the prejudice of a deserving heir. I think also that it is partly unjust, as made contrary to Lord Murkle's recommendation. It appears that Lord Caithness, immediately after Lord Murkle's death, considered himself as bound by that recommendation. These questions, however, are not now before us: I am clear that Sir John Sinclair is at present entitled to be preferred.

AUCHINLECK. The question is upon the import of the deed, not of the letters. Upon the supposal that Lord Caithness was of a disposing mind, the settlement itself must be the rule. Lord Caithness meant to call *some* heirs of Lord Woodhall after the heirs of his body. The question is, Who those heirs

are? The style is odd, and has a hermaphroditical appearance. Heir-male of line is lineal heir-male; *hæres masculus lineæ et hæres linealis masculus* are the same. The specialty of settling the estate upon the heir of line and heir of conquest, is nothing to the purpose. This never entered into Lord Caithness's imagination.

KAIMES. I lay aside every collateral circumstance: a clause, by being dubious, is not to be held inexplicable. I do not commend the writer, because he went out of the known style. Heirs-male of line implies those who are natural heirs, not those who are created by deed.

PITFOUR. Somebody other than the issue male of Lord Woodhall is here meant. I take the clause in the sense which Sir John Sinclair's counsel have put upon it. Lord Woodhall had ambiguous heirs-male. This clause means the heir of line,—Peter, in preference to Sir John, the heir of conquest. I should have thought there was an ambiguity, were it not for the collateral evidence. The argument for Lady Fife is a pleadable critical argument. I have, however, a doubt whether Lord Caithness could make this deed in consistence with the tacit fideicommiss from Lord Murkle's letter. The civil law makes the expressions *se scire*, *credere*, or *existimare*, if addressed to heir, obligatory as a fideicommiss. See also Lord Caithness's letters after Lord Murkle's death, wherein he seems to have had this notion.

ALEMORE. Suppose this last argument good, still Sir John must be served, in order that he may denude. Lady Fife cannot be served upon the letters quoted. Three judges have each of them explained the phrase—heirs-male of line, in a different sense. This should teach conveyancers to be cautious, and not to use new terms. As Peter Sinclair is dead, Sir John Sinclair is both heir of line and of conquest to Lord Woodhall. I do not like a fideicommiss in letters or by momentary resolutions. Lord Murkle certainly left his brother at full power: Besides, how can there be a fideicommiss on deathbed?

PRESIDENT. The question as to fideicommiss is at present improper. I have not the smallest notion of the letters being evidence in this cause. The cause of *Tenant* was quite different: there the deeds were all considered together as making one settlement. An ambiguity of expression will not cut down the deed. I think heir-male of line is lineal heir-male. Had Peter Sinclair had a younger brother, he would have come in. Shall Sir John Sinclair lose the estate because he is both heir-male of line and of conquest? The Roman fideicommiss is not received into our law: Besides, the codicil of the 8th May is later than the letters from Lord Murkle.

Affirmed on appeal.

1766. *August 2.* PETER RAMSAY and OTHERS, Councillors and Burgesses of Pittenweem, *against* ANDREW MARTIN and OTHERS.

WITNESS.

A Witness for the Pursuer having sworn, upon her examination *in initialibus*, that she had no malice against the defender, found not competent for the Defender to adduce other witnesses to prove that she had used expressions importing malice against him.

PETER Ramsay and Others exhibited a complaint to the Court against Andrew Martin and others, setting forth that the election of magistrates and councillors for the burgh of Pittenweem, at Michaelmas 1765, was brought about by bribery and corruption; and therefore praying that the Court would set aside that election.

The Court allowed a conjunct probation in common form, and granted commission. Among other witnesses, the complainers produced Ann Thomson, the daughter of one of the respondents. The agent for the respondent protested for reprobators against her, and, in the initials of her oath, interrogated her specially as to many things, and, in particular, whether she bore or ever threatened malice against the respondents?—to all which she deponed *negative*. Ann Thomson deponed as to a conversation which had taken place between her father and Andrew Martin, relative to a supposed plan or agreement for bribing the burgh. Some days after, the respondent examined one Margaret Oumston, for proving certain expressions importing malice, and alleged to have been uttered by Ann Thomson, with respect to Andrew Martin, or some other of the respondents.

The complainers suffered this examination to go on; but, upon perceiving the tendency of such interrogatories, they forthwith protested that her deposition might not be admitted into the proof, and that no other witnesses might be examined for the purpose of reprobating the testimony of other witnesses, unless by the regular form of action of reprobator. Christian Thomson, however, was examined for the like end with Margaret Oumston.

Upon this the complainers applied by petition to the Court, praying the Lords “to find that the proof of reprobator, attempted on the part of the respondents, cannot be admitted incidentally as part of the proof in the principal cause; but that the same must proceed in the regular and established form; and, therefore, to ordain the depositions of the said Margaret Oumston and Christian Thomson to be expunged from the proofs; and also to ordain such other depositions, or part of them, as are liable to, and as have had the same objections made to them, to be expunged from the proof.”

To this petition answers were put in for Andrew Martin and others, respondents in the original complaint.

ARGUMENT FOR THE COMPLAINERS :—

When a witness is suspected of swearing falsely upon any of the matters which have gone to proof, the opposite party has a title to render the character of such witness suspicious, by redarguing what he has said upon the subject-mat-

ter of the proof itself; but it is not competent to bring evidence incidentally, for proving that a former witness has sworn falsely in what relates not to the subject-matter of the proof. This must either be done by an action of reprobator, if the falsehood is *in initialibus*, or by a common action on the head of perjury, if the falsehood is *in substantialibus* of the oath. When this distinction is attended to, it will be found, that the respondents, by being precluded from the proof in the manner sought, are not precluded from an exculpatory proof. Thus, if a witness should say that a bribe was given by one person to another at a particular place and time, each of those circumstances is the proper subject of an exculpatory proof. It is competent to prove, that he who is said to have given or to have received the bribe, was not present at the time or place mentioned by the witness; and, if this were proved, then perjury on the part of the witness would be proved;—a perjury tending to hurt the defenders in the very matters upon which the parties had joined issue. But the question presently agitated is quite different. The respondent's averment is, that Ann Thomson, before she was brought upon oath, used expressions of malice against Martin, and, when brought upon oath, denied these expressions. The respondents do not desire to prove actual malice, but to prove that Ann Thomson did say she had malice. Now, supposing this to be true, it will not disprove any act of bribery sworn to by Ann Thomson, or any other witness; and, consequently, will not affect the subject-matter of that charge which is brought by the complainers. That the proof sought to be taken and reported incidentally, may tend to discredit the witness, is not of itself sufficient. Were every thing which might tend to create suspicions of a witness's veracity to be received, although not relating to the subject-matter in issue, upon what principle could the Court refuse a proof of the character of a witness? And yet such proof of character is constantly rejected.

ARGUMENT FOR THE RESPONDENTS:—

Although it is competent for the respondents to insist against Ann Thomson in a proper action of reprobator, with concurrence of his Majesty's advocate, in order to have her deposition cancelled, and herself declared infamous, yet there seems no doubt but that they may incidentally bring witnesses for the purpose of discrediting the evidence given by her, and for that purpose solely; and, as this is the sole purpose of the proof which they have, and propose still to lead, there is no occasion to make her a party. Actions of reprobator are in disuse: none have been brought into Court for these ten years past, as this incidental method of discrediting testimonies has been found sufficient. The practice at present seems reasonable and expedient. The rule of law is, *cui damus actionem, ei multo magis damus exceptionem*. Were parties always obliged to insist in formal actions of reprobator, it would increase expense to them without necessity. The present practice has been established ever since proofs before answer were allowed; for, by the form of interlocutors in such cases, parties are allowed to prove all facts and circumstances which they may judge material. Neither is there any danger of perjury remaining unpunished by the disuse of actions of reprobator; for the Court can, and, *ex officio*, does, punish perjury whenever it occurs in the testimony of witnesses. And, as there are many examples of such punishments where there occurred no action of reprobator, it is plain that the testimony of witnesses has been discredited incidentally; for the false witness

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could not in such cases have been punished had he not been convicted by contrary evidence.

On the 19th July 1766, "the Lords ordained the depositions of Margaret Oumston and Christian Thomson to be expunged."

On the 2d August they adhered, upon advising a reclaiming petition and answers.

Act. G. Cockburn, H. Dundas. Alt. T. M'Claurin, R. M'Queen.

OPINIONS.

AUCHINLECK. The point does not concern the *initialia* of the oath: it is not sought to prove malice, but to prove that the witness has perjured herself, by denying that she had said she harboured ill-will against Martin.

COALSTON. There are three questions put in the *initialia*: Have you been instructed;—have you received a reward to swear;—do you bear malice against the parties? The meaning of a protest for reprobaters is, that the party may be allowed to disprove the *initialia*. Here the proof may detract from the credibility of the witness.

PRESIDENT quoted the case of *Fulton's Children* against *Malloch*, where the Justiciary Court would not allow witnesses to be examined, in order to prove that a witness had said one thing before he was examined in Court, and another when examined in Court.

Diss. Pitfour, Gardenston. *Non liquet*, Coalston.

1766. August 5. JEAN HUNTER, Relict of David Gray, Mariner in Dundee, and ELIZABETH HUNTER, Spouse to John Jaffray, Writer in Forfar, against JANET BROWN, Relict of Andrew Hunter, Resdenter in Forfar.

HUSBAND AND WIFE.

What Deeds are extinguished by Dissolution of the Marriage within Year and Day.

[*Faculty Collection*, IV. 270; *Dictionary*, 6164.]

ANDREW Hunter had three sisters, Margaret, Jean, and Elizabeth. Margaret died: Andrew intromitted with her effects, but made up no title to them. the 7th January 1764, Andrew Hunter gave up his name for having the bride proclaimed between him and Janet Brown: It appears that the bridegroom few effects; the bride, none. On the same day Andrew Hunter executed a deed in favour of Janet Brown: Its narrative bears "for the pure love, favour and esteem I have for Janet Brown, lawful daughter of the deceased: Brown, sometime messenger in Forfar, my betrothed wife, and for her being in the world after my decease." By this deed he made a general conveyance of his moveables in her favour, reserving his own liferent right.

empowered her to intromit after his decease, and he took her bound to pay his debts and funeral charges. He added the following clause,—“ I hereby debar and exclude all my friends and relations from having any interest in the subject above disposed, or troubling and molesting the said Janet Brown in the peaceable possession thereof.” He warranted this disposition “ from his own proper fact and deed done or to be done.” The marriage was soon after solemnized, but it appears that it did not long subsist; for, on the 29th August 1765, the register of burials bears, that Andrew Hunter was buried on that day. Thus the marriage dissolved within year and day: there was no child of the marriage. On the 27th October 1764, Jean and Elizabeth, the surviving sisters of Andrew Hunter, obtained themselves confirmed as executrices *qua* nearest in kin to their brother. In consequence of this title they insisted, in an action before the Sheriff of Forfar, against Janet Brown, the widow, concluding for a delivery of the goods which belong to their sister and brother.

Janet Brown pleaded on Andrew Hunter's deed as a preferable and exclusive title.

On the 27th November 1764, the Sheriff-substitute “ found, that besides the common and proper designation given to Janet Brown, the disponent, for the gratuitous cause therein mentioned, that the additional appellation given her, viz., my betrothed wife, point out clearly, that the reason for granting was in consideration of the intended marriage, which being dissolved within year and day, as appears by the certificates produced, therefore sustains the pursuers' claim, as set forth in the libel and pleadings on their titles, as nearest of kin to their deceased brother the cedent, produced; and decerns accordingly.”

Janet Brown reclaimed, and pleaded that Margaret had, by a nuncupative testament, left her effects to Andrew, and that Andrew had a daughter; so that the pursuers could not be his nearest in kin.

On the 13th December 1764, the Sheriff-substitute “ found that the deceased Andrew Hunter, granter of the disposition in question, has a daughter in life, is *jus tertii* to the petitioners; and refused the petition.”

On the 5th February 1765, Janet Hunter having reclaimed to the Sheriff-depute, he advised the process, gave an instruction to adhere, but to find no expenses due. Upon this she advocated the cause.

On the 23d January 1766, “ The Lord Kennet, Ordinary, remitted the cause to the Sheriff, with this instruction, that he sustain the pursuers' title; and appoint the defender to give in an account of charge and discharge of her intromissions with her husband's effects, and afterwards to proceed in the cause as to him shall seem just.”

On the 4th February 1766, the Lord Ordinary “ refused a representation and adhered.”

ARGUMENT FOR THE DEFENDER:

The severe law, annulling all deeds in favour of husband and wife, when the marriage subsists not for year and day, is introduced by custom not statute. This has not been extended to any deeds but those whereof marriage is the efficient cause, as the rights of terce and courtesy, marriage-contracts, and

tacks set to husband and wife. Such deeds alone can be said to be executed *intuitu matrimonii*; for such only would be null were marriage not to follow. Agreeable to this are the opinions of our lawyers. Craig, in treating of this question, *l. 2, tit. 22, § 23*, mentions only *dos et donatio propter nuptias*; Spotiswoode, p. 155, speaks only of tocher good; Lord Stair, still more fully, *B. 1, tit. 4, § 21*,—"By our custom, if marriage dissolves within year and day after the solemnizing thereof, all things done in contemplation of the marriage become void, and return to the condition they were in before the same; and in this our custom agrees to the civil law: and so the tocher returns back to the wife, or those from whom it came; and she hath no benefit of any interest, either in his moveables or heritage, by law or contract provided to her; nor hath he any interest in hers." The deed in question is precisely upon the same footing as an absolute disposition granted by a father to a son, whereof the inductive cause appeared from circumstances to be the enabling the son to make settlements in a marriage contract. If the marriage subsist not for year and day, the marriage contract will be null, yet the disposition will be good. The law distinguishes between deeds *inter sponsum et sponsam*, and *inter virum et uxorem*. The latter are revocable, while the former are not. *2dly*, Supposing this deed to be a marriage contract, yet the clause whereby Andrew Hunter excludes his nearest in kin must be understood as equivalent to a dispensation with the law of year and day. No particular mode of such dispensation is required, and here the intention of the disponent is clear. If the wife be excluded by the law, and the relations by the deed, then the subject would become caducary, which can never be the intention of one executing a settlement of his affairs.

3dly, The deed is in truth not a marriage-contract, but a testament. By it the liferent is reserved; its effects are suspended until the death of Andrew Hunter; it is burdened with the payment of his debts and funeral charges. Besides, it never was delivered, and although it contains a clause of warrandice; that is not inconsistent with the nature of a testament, however uncommon it may be. If then this deed is a testament, it must be effectual; for there is no law which deprives a bridegroom of the *libera testandi facultas*, in favour of his bride or of any one else.

ARGUMENT FOR THE PURSUERS :—

The law concerning the consequences of marriage dissolving within year is established by custom, in the same manner as many other peculiarities of our law are established. Neither is it rigorous; for settlements made *intuitu matrimonii* and *ad sustinenda onera matrimonii* are properly set aside when the marriage subsists for a short space and is not attended with children.

This law has been found to relate to deeds done *intuitu matrimonii*, other than marriage-contracts. See the case *Grant against Grant*, 16th November 1683, observed by Durie,—where the infestment granted by a husband to a wife was set aside upon account of the dissolution of the marriage, although the infestment, as Durie observes, bore no relation to the contract. The words used by Stair, *all things*, show that he did not mean to restrict his position to marriage-contracts. The words *in contemplation* may as properly relate to what follows as what precedes the marriage. The expressions in this deed, "be-

trothed wife," and "for her better living after my death," are clearly descriptive of a marriage-contract, or obligation *intuitu matrimonii*.

2do, The clause excluding the nearest in kin is exegetical and superfluous : the same thing would have been implied although not expressed ; for whoever alienates from his heir, or executor, virtually excludes them. Had the marriage dissolved within year and day by the predecease of the wife, her subjects would have fallen to her own executors, and it would have been unjust to give this interpretation to the clause whereby the wife and her executors would be sure of gaining, and have no chance of losing in any event.

3tio, This deed is not of a testamentary nature : Every marriage-contract reserves the husband's liferent ; for the wife's jointure takes not place till the husband's death. Were a marriage-contract to be conceived in such form as to give the surviving wife the whole of her husband's effects, she would be liable for the whole of his debts. The style of the deed, as has been already shown, points it out to be a marriage-contract, not a testament ; and this case resembles, and will be determined upon the same principles as that of *Bell against Somerville*, 16th July 1751,—observed by Falconer.

On the 14th June 1766, the Lords adhered.

On the 24th July 1766, upon advising a reclaiming petition and answers, the Lords "advocated the cause, repelled the objections to the deed in question, assoilied the defender, and decerned."

On the 5th August the Lords refused a reclaiming petition and adhered.

Diss. Kennet, Auchinleck, Hailes, President. *Non liquet*, Justice-Clerk.

Act. J. Douglas. R. M'Queen. Alt. G. Fergusson. G. Buchan.

OPINIONS.

PITFOUR. I do not know the origin of the law as to year and day. This deed however is not in contemplation of marriage. Parties may dispense with the law as to year and day ; here it is a *quæstio voluntatis* whether Hunter meant to dispense with the law. Here the argument in law is brought in to prevent a man from doing what he intended to do. The rule of law relates to mutual contracts only,—this is a testamentary deed because it remained in the man's custody. In the case of the widow of Mr Gilbert Stewart, mournings were allowed to the widow, although the marriage dissolved within year and day.

KAIMES. The deed is *intuitu matrimonii*, but not *ad sustinenda onera matrimonii*. It is a testamentary deed. Can we suppose that the husband meant that his wife should draw nothing ?

KENNET. Although the deed is not *ad sustinenda onera matrimonii*, it is as much so as a jointure.

AUCHINLECK. It is a provision *intuitu matrimonii*, although in the event of death.

HAILES. This is just such a marriage-contract as must be executed when the husband has effects and the wife none. The clause of warrandice does not look like a clause in a proper testament. The clause, *for her better living in the world after my decease*, implies that during his life she was to live by him, that is, be his wife and be maintained by him.

BARJARG. Doubts of this deed being *intuitu matrimonii*. The case of *Bell and Somerville*, 16th July 1751, was much stronger, for there a formal narrative occurred of a prior marriage-contract.

GARDENSTON. This is a testamentary deed. The clause debarring his relations is a clause never used in a marriage-contract.

COALSTON. I never could find a foundation for the law which rendered all deeds null if done *intuitu matrimonii* when the marriage dissolved within year and day. I shall never be for extending a peculiarity in our law inconsistent with reason. This is a testament, not a marriage-contract.

PRESIDENT. I cannot get over the law in the case of the widow of Mr Gilbert Stewart. The claim for mournings was as a wife, not as one continuing a wife for year and day. The case of *Read* proceeded on this specialty, that the provision was in favour of the son, not of the wife. The law has made the rule as to year and day: a man's will often is to dispense with that law; but, if he omits to dispense, the Court cannot supply the omission. The narrative of the deed, and all its circumstances, concur in showing that it was executed *intuitu matrimonii*.

1766. August 5. **DAVID MODREL** of Muirmill *against* **JOHN DIN**, Portioner of Easter Craigannet.

IRRITANCY.

Lands being disposed in security of a debt, with a declaration, that, if the debtor did not redeem, before a certain term, the lands should be held as sold to the creditor irredeemably, without necessity of declarator; *found*, notwithstanding, that the irritancy was purgeable before declarator.

The ten-shilling land of Easter Craigannet, called Glendales, belonged to Andrew M'Clay. On the 7th November 1731, Janet Adam, mother of Andrew M'Clay, granted a bond to John Liddel for 1390 merks; and, although her feudal right in those lands does not appear, yet she became bound to infest Liddel in them for the further security of his debt, principal and interest. At the same time Andrew M'Clay, the proprietor, granted an heritable bond to John Liddel for 600 merks upon the same lands. John Liddel, having been infest upon those two bonds, did, on the 10th August 1737, obtain a decret of poinding the ground, before the Sheriff of Stirling, against the tenants and possessors, as well as against Janet Adam and Andrew M'Clay. Liddel being about to adjudge the lands, a disposition was executed in his favour by his two debtors: The question in issue turned upon the import and consequences of that disposition. The disposition recites the two bonds, and the decret of poinding of the ground; that Liddel had raised and had executed a summons of adjudication for adjudging the lands; that M'Clay was liable in both the bonds, and that the sum due on them, together with expenses, amounted to L.1600 Scots; and that "the said Janet Adam and Andrew M'Clay, foresee-

ing what would be the effect of the said decret of adjudication, and the expenses that would be accumulated on him, the said Andrew M'Clay thereby, and being most willing and desirous to prevent the same, and to do all manner of justice to the said John Liddel, had therefore agreed to grant him the security underwritten."

Upon this narrative, Andrew M'Clay, "without prejudice to the said two heritable bonds, decret of poinding, or farther diligence that had or might follow thereon," did accumulate the two debts into one principal sum of L.1600 Scots, which he became bound to pay to John Liddel within the years of reversion aftermentioned. Further, for his better security, Andrew M'Clay, with consent of his mother, disposed to Liddel, his heirs and assignees, the lands of Glendales, redeemable always by M'Clay, his heirs and successors, by payment or consignment "of the said sum of L.1600, and annualrents thereof, and that at any term of Whitsunday or Martinmas, betwixt or upon the term of Martinmas 1742, allenarly, upon 40 days' premonition," &c.; reserving to Janet Adam, her liferent of part of the subject, valued at L.30 Scots yearly. In case M'Clay, or his foresaids, should neglect to redeem the lands within the space foresaid, then M'Clay sold them to Liddel, &c. heritably and irredeemably, without necessity of declarator, with this proviso, that, in that case, Liddel should be bound to pay 600 merks, with the interest due, as contained in an heritable bond granted by M'Clay to Margaret Provan. Then follows this clause:—"And which accumulated sum above written, with the said sums due to Margaret Provan, are thereby declared, in the event of the not-redemption, to be the full and adequate price and value of the subject thereby disposed."

At the date of this disposition, it appears that the lands of Glendales exceeded in yearly value the legal interest of the price aforesaid. On the same 14th November 1737, John Liddel granted to M'Clay, and his mother, a general discharge of all claims, excepting always the two heritable bonds, the decret of poinding the ground, and disposition aforesaid; and declaring that this discharge should be nowise prejudicial "to the two heritable bonds, sums therein contained, &c., nor to what may follow thereon." On the very same day on which the disposition was granted, Liddel was infeft: he immediately entered into possession, and he and his successors have continued to possess.

Soon after this transaction, Andrew M'Clay went into foreign parts, and never returned. His eldest son, William, made up titles to his father by precept of *clare constat* and infeftment; and, upon that, granted a disposition of the lands to David Modrell. On the 5th October 1764, David Modrell brought an action against John Din, the heir of Liddel, concluding for exhibition of the deeds above mentioned, and for having Din brought to account for his intromissions; and that, upon the debts being found extinguished by intromissions, or upon the balance being paid, he should renounce the lands, and make them over to the pursuer.

On the 20th December 1765, the Lord Auchinleck, Ordinary, found, "That, from the tenor of the disposition granted by Andrew M'Clay to John Liddel, joined with the amount of the price, not being quite twenty years' purchase in 1767, there is sufficient evidence that Andrew M'Clay did not intend to make

a sale of his lands, but only to obtain a delay of diligence from John Liddel his creditor; and, therefore, that the clause by which the lands are declared to be irredeemable, in case M'Clay did not pay up his debt to Liddel within the time limited, is to be considered as penal; and that it is competent to the pursuer, as in right of M'Clay, to redeem the lands, upon payment of the sum truly due, after discounting the intromissions had by the defender and his predecessors."

On the 23d February 1766, he adhered.

Against this interlocutor Din preferred a reclaiming petition, to which answers were put in.

ARGUMENT FOR THE DEFENDER :—

The right challenged, however redeemable in 1737, became absolute in consequence of redemption not having been used : There was then an irredeemable sale for what the parties understood to be the value of the lands. This appears from the additional price then covenanted, which, with the sums originally paid, was declared to be the adequate value of the lands. Upon this supposition, all the pieces of the feudal conveyance, as also the assignation to the rents, are formed. By providing that the two heritable debts should be kept up, nothing more was meant, however inaccurately expressed, but that they should not be extinguished until the right to the lands became irredeemable. Any small difference between the value of the subjects sold, and the quantity of the debts, will not be sufficient to set aside the sale. *Pactum legis commissoriæ in pignori-bus*, was reprobated by the later civil law, because, in that law, *pledge* was a right different from *property*, and it was held an inconsistency for a pledge, by lapse of time, to become property; but this applies not to rights of reversion. By the law of Scotland, they are from the beginning rights of property, never rights of pledge. By the Act of Sederunt 1592, the Lords declared that they would decide in all clauses irritant, according to the express words and meaning thereof : This shows that the civil law, as to *pactum legis commissoriæ in pignori-bus*, was not received into Scotland, and in no case has the Court extended a right of reversion beyond the time limited, when it appeared that the parties meant to conclude a true and irredeemable bargain of sale. But, supposing the lands redeemable, still the defender ought not to be found liable to account for the rents. If the lands were still redeemable after Martinmas 1742, the right in the defender since that period can only be considered as a proper wadset. Besides, the defender has levied the rents, and consumed them, *bona fide*, upon a title to which no apparent challenge lay, and therefore cannot be liable in repetition.

ARGUMENT FOR THE PURSUER :—

The right granted by M'Clay to Liddel, is plainly a right granted by a debtor to a creditor from the dread of diligence by adjudication. If it was redeemable in 1737 when granted, there is no reason for supposing that in 1742 it changed its nature, and became irredeemable. The same compulsion which occasioned the granting of the right, made the term of redemption to be limited to five years. This transaction differed essentially from a fair sale under reversion. It was not for a price paid, but an impignoration of lands for debts already contracted : though calculated to prevent diligence by adjudication, it was in effect more rigorous than such diligence. The legal of an adjudication would have subsisted for ten years; whereas, here, the reversion was limited to five years.

Neither was the debt discharged, which ought to have been done had those debts been considered as the full price of the lands. The payment of Provan's debt was an unnecessary stipulation; for that debt, being heritable, must have remained a burden on the subject, so that the payment of this debt could never be intended as an addition for completing the purchase money of the lands. It is certain that all the debts taken together did not amount to the value of the land on a fair sale, and this shows that the irritancy on not-redemption was rigorous and penal. When lands are impignorated for security of debt under clauses irritant, the Court has been in use to extend the equitable term of redemption, and not to suffer it to be foreclosed without declarator. The *pactum legis commissoriæ in pignoris* was absolutely reprobated by the civil law: our ancient practice inclined to support such irritancies, but our later practice has approached nearer to the civil law, unless where a sale for an adequate price was originally intended, and a limited reversion granted, not of right but from favour. Whenever the irritancy has been added to a right originally in security, such irritancy has been considered as penal, and made purgeable until declarator. See Stair, b. 1, tit. 13, § 14, and Dictionary of Decisions, title *Irritancy*. As to the plea against accounting since 1742, it is frivolous: between 1737 and 1742 the defender is certainly accountable: the deed did not change its nature in 1742, and it is only upon the supposition of its not having changed its nature that the lands are redeemable at all. Had the rents fallen short of the interest of the debt, the pursuer would have been bound to make up that deficiency on redemption. As the rents have exceeded such interest, the defender cannot be allowed to retain them without account; for this would be to convert a right of security into a usurious wadset, contrary to the Act 62, Par. 1661. The answer to the plea of *bona fides* may be made in the words of Lord Stair, b. 2, tit. 1, § 24:—"When, by a common or known law, the title is void materially, the possessor is not esteemed to possess *bona fide*.—Durie, 16th November 1633, *Grant*." Liddel could not but know the nature of his own right, as being in security of debt, not absolute; and the defender can be in no better situation than Liddel, as he is the representative, not the singular successor of Liddel. He who *bona fide* spends the rents of an estate, believing it his own property, may be relieved from repetition at the instance of one instructing a preferable right. But that is not the case here: for, as Liddel's right was in security of debt, it was extinguishable by payment; and he has paid himself by levying the rents. Were he or his representative not liable to account, he would hold the subject and yet keep up the debts for payment of which the subject was granted; than which nothing can be more opposite to principles and practice. See Dictionary, vol. 1, p. 107-8; 8th July 1636, *Cleg-horn*; and the late case, December 1760, *Heirs of William Sellers*.

On the 4th July and 5th August 1766, the Lords adhered.

Act. D. Rae. Alt. D. Græme.

OPINIONS.

PITFOUR. A rule concerning irritant clauses was established by Act of Sederunt 1592; but at that time no such rights of property as that in question were known.

PRESIDENT. The cords of penal irritancies are not to be drawn closer in this age: the plea of *bona fides* will not authorise one to draw rents, and yet keep up the debt for which possession of such rents was granted.

COALSTON,—for adhering. The disposition 1737 was granted by a debtor in order to prevent diligence, not for a full price.—Redemption for equitable considerations is still competent. If so, how can we change an improper wadset into a proper one, and find the defender not accountable for the rents since 1742.

KAIMES. A *pactum legis commissoriæ in pignoribus* is good in our law, but reducible. The rents from 1742 were levied by the creditor, *qua* proprietor. Suppose these rents had fallen one half, the creditor would have had no demand for the deficiency, so as to make up his interests.

1766. *August 6.* FRANCIS BRODIE, Wright in Edinburgh, *against* the TRUSTEES of the MIDDLE DISTRICT in the County of MID-LOTHIAN, and THOMAS DICKSON, their Servant.

PUBLIC POLICE.

Powers of Road Trustees in widening a public road to the statutory breadth.

FRANCIS Brodie is proprietor of a tenement in the Canongate of Edinburgh, bounded on the east by the common vennel, called the Horse-Wynd: that vennel is a public road leading from Edinburgh, but at present it is not above ten feet wide. The trustees for the high roads in Mid-Lothian ordered Thomas Dickson one of their overseers to widen that road, in terms of law. In consequence of those orders, the overseer set about cleaning away rubbish, and was preparing to demolish some low houses within the limits of Brodie's property. Brodie made application to the sheriff for stopping this work. On the 25th July 1766, the sheriff pronounced an interlocutor to the following purpose:—"In respect this vennel is the only entry to one of the public avenues leading to the town of Edinburgh, finds it falls properly under the administration of the trustees, and that they have power to widen the same, in terms of the Acts of Parliament concerning public roads, upon provision that they pay the value to the proprietors for such houses as they shall be under necessity of taking down." Brodie offered a bill of advocation, which was refused by the Lord Kaim, Ordinary on the Bills. He then applied to the Court by petition, to which answers were put in.

ARGUMENT FOR BRODIE :—

The damages arising to the petitioner from the plan of the trustees are obvious: part of his area will be seized for enlarging the vennel; his houses will be demolished, and the remaining part of his area will be rendered of no value on account of its narrowness. In these circumstances he pleads that the trustees have exceeded their legal powers. Whenever the property of a private man is taken from him for the public good, he is entitled in law to receive its full

value. By the turnpike acts, not even the materials for making of a highway are to be taken without payment of damages to the proprietor of such materials. And, by the statute 28 Geo. II., respecting the highways in Mid-Lothian, the trustees are empowered to treat for and agree with any proprietors of lands, &c. "lying contiguous to or near the said roads, for such lands or grounds, and for the loss or damage which they may anywise receive, by turning or altering the roads; and thereupon, and upon payment of such sum of money so agreed upon accordingly, it shall be lawful for the trustees to turn the said road over the said ground or land." Thus the indemnification is to be paid before the trustees can incroach upon any man's property; and the sheriff committed iniquity in allowing the work to proceed before the terms of the indemnification were adjusted, as well as in restricting the indemnification to houses without mentioning lands.

ARGUMENT FOR THE TRUSTEES :—

The petitioner has misunderstood the laws relating to highways: he has also misunderstood the powers of the trustees. The statute law of Scotland requires, that all highways be 20 feet broad.—When a highway is not of that breadth, the trustees are authorised, nay, required to enlarge it to the statutory standard. In such case, no damages are due to any one; for the public does thereby vindicate its own right, not encroach upon the right of another. The vennel in question is a highway,—at present not above ten feet wide: the trustees seek no more than to enlarge it to the statutory standard. The Act, 28th Geo. II., relates not to the case where a highway is widened to the statutory standard, but the case where the old road is deserted and a new one made in another direction: but this is foreign to the question in issue, where the old road remains, and no alteration is made but that of bestowing on it its lawful breadth. Besides, by an Act 24th Geo. II., the trustees have power, when they see cause, to extend a road beyond the legal standard, "to pull down and demolish any house or building whose side walls shall not exceed twelve feet in height, for that purpose." This surely implies that they may do the same thing, when they only extend a road to its legal standard. The damages that are given on account of materials used in highways, cannot affect the present question. Although that law has ordered all roads to be of a certain breadth, yet there is no law nor reason which requires that any private person should furnish, gratis, the materials necessary for making such roads. Although the trustees are not bound to indemnify Brodie, yet, *ex gratia*, they have offered to indemnify him according to the same rates which they have paid to other proprietors in similar circumstances: but their willingness to confer a favour on him, cannot alter the statute law, or authorise him to stop this necessary work until the *quantum* of the indemnification shall be ascertained.

On the 6th August 1766, "The Lords remitted to the Sheriff, with this instruction, that he reserve to Brodie a liberty of applying to the trustees for a recompense."

Act. G. Wallace. Alt. H. Dundas.

OPINIONS.

PRESIDENT. The trustees may give a recompense ; but thinks that it is proper to remit to the Sheriff, with an instruction for determining the recom-

ALEMORE,—Proposed that the reservation should be, that Brodie might apply to the trustees for a recompense.

This was done with consent of the trustees.

1766. *August 8.* DOCTOR JOHN EUSTACE of the City of New York, Physician, *against* MRS ANN PRINGLE, Widow of Colonel John Young.

BILL OF EXCHANGE.

The payee of a Bill, bearing to be for value, found obliged to condescend upon the value, in respect that it was not a mercantile transaction, but a Bill drawn by an officer of the army in favour of his physician.

On the 21st April 1762, Colonel Young, of the 46th regiment of foot, drew and accepted a bill upon himself, payable three months after date, at his agent's, Mr Henry Drummond of London, to Doctor Eustace, for L. 400 sterling value received.

On the 24th July 1762, the bill, having been presented at Mr Drummond's, and payment refused, was regularly protested.

In April 1766, Colonel Young died : his widow was decerned executrix to him. Dr Eustace insisted in an action against her for payment of the bill. The widow, suspecting that the bill was not for value, but impetrated gratuitously from the Colonel while at New York in a weak condition of mind as well as body, insisted that the Doctor should make answer to special interrogatories put to him concerning the cause of this bill, and the nature of the transactions between him and the Colonel.

On the 5th August, "The Lord Gardenston, Ordinary, ordained the pursuer, by a writing under his hand, to condescend on the value of the bill, and to answer the special interrogatories relative thereto."

The pursuer reclaimed and pleaded, That, in all mercantile countries, when a bill is granted, value is presumed, even although not expressed, unless the contrary be instructed by writing or oath of party ; and this *a fortiori* must be the case when, as here, the bill expressly bears value received. There is no example where the *onus probandi* of value, or even of condescending on the value, was laid upon the porteur of the bill, when the bill itself bore value received. See 11th February 1701, *Wightman against Moncur*, observed by Fountainhall. If the defender is not satisfied of the onerosity of the bill, or suspects any fraud, she may bring a reduction of the bill. The pursuer con-

descends, that it was granted on account of 18 months' entertainment of the Colonel, and of the pursuer's personal attendance on him as a physician during that space : and he is bound to do no more : Perhaps he has done already more than was incumbent on him. " His compliance might be fatal, in point of precedent, to the established laws of every mercantile country."

On the 8th August 1766, " The Lords adhered."

Petitioner.—William M'Kenzie.

OPINIONS.

HAILES. The petitioner is very anxious for the law of merchants. This, however, is not a mercantile transaction,—a bill drawn by an officer of the army in favour of his physician.

1766. *August 8.* MRS ANNE and MARY SELLERS, Heirs-Portioners of Mr William Seller, Writer in Edinburgh, *against* JOHN BROWN, Merchant in Edinburgh.

TACK.

Construction of a clause in the lease of a brewery, binding the tenant to uphold the brewing looms and vessels, &c. and restore them in good condition at the end of the lease, tear and wear excepted.

In 1756, the deceased William Seller granted to the deceased Simon Bennet, brewer in Edinburgh, a lease of a dwelling-house, brewery, and pertinents, together with the brewing utensils therein mentioned, and that for the space of 15 years, from Martinmas 1756. William Seller " bound and obliged himself to uphold and maintain the roofs of the dwelling-house, brewery, and hail pertinents thereof, wind and water-tight, during the continuance of the tack." Simon Bennet, the lessee, and John Brown, his cautioner, " bound and obliged themselves, conjunctly and severally, to uphold and maintain all the brewing looms and vessels, and others above specified, and the going graith upon the well, in sufficient repair, during the currency of this tack ; and to restore and deliver back the said brewing looms, and others above mentioned, and the going graith upon the well, all in good condition, at the expiry of the present tack, tear and wear always excepted, according as the same shall be determined by two men, one to be chosen by each part."

The lessee was allowed a breach at the end of each three years, upon a notification of six months. After the death of William Sellers, a question arose between Bennet, the lessee, and Seller's heirs, whether the brewing looms and appurtenances were to be maintained by the master or by the tenant? A submission, in terms of the tack, was entered into, but proved fruitless. Bennet withheld his rents, on pretence of repairs laid out by him. He died bankrupt : the heirs of Sellers charged his cautioner with horning, for payment of

the rent: he suspended upon this ground, that he was entitled to the expense of the necessary repairs laid out by Bennet, as a deduction from the rent.

On the 15th February 1766, the Lord Auchinleck, Ordinary, "Found, That, by conception of the tack charged on, the chargers are bound to uphold the roofs of the subjects therein mentioned; but that they are not thereby bound to uphold the utensils belonging to the brewery, the hair-cloth, or the going graith upon the well, particularly specified in the tack; and therefore repels the reasons of suspension, except in so far as relates to the alleged damage sustained through the charger's not having kept the roof of the brewery in repair."

On the 27th February and 12th June 1766, the Lord Ordinary adhered.

The suspender put in a reclaiming petition, to which answers were made.

ARGUMENT FOR THE SUSPENDER:—

In all cases, a sum is paid by the tenant for the use of the subject leased: and this sum is proportioned to the benefit which may arise to the tenant from such lease, and to the deterioration which the subjects may sustain from use. Hence, if nothing is stipulated to the contrary, the tenant is entitled to enjoy the subject in a reasonable manner, without being liable in more than the stipulated rent. On the other hand, the granter of the lease is bound to uphold the subjects, so as that they may be capable of the use for which they were let: this is laid down in the civil law,—*L. 15, § 1* and *2*,—*L. 55, § 1, D. Locati Conducti*; and it is agreeable to reason. Hence, if there be no express paction to the contrary, the granter of the lease must uphold the tenement leased. On this account it is that the rent of subjects is proportioned to the deterioration which they suffer by use, and to the expense of upholding and repairing them; hence houses are let at about six or seven per cent of their real value,—breweries at about 12 per cent: Because the expense of upholding houses is small,—the expense of upholding breweries is great. If, then, by this tack, there were no express obligation to the contrary, the landlord would be liable in all necessary repairs. It remains, then, to consider, Whether the obligation on the tenant, in this case, to uphold the brewing looms, is to be understood as making him liable to bestow such repairs only as may be requisite for preserving those utensils as long as they are capable of being so preserved, or as making him liable to furnish new utensils in place of those which have become useless; and not the granter of the lease.

The words of the lease are sufficient to show that the granter of the lease, not the tenant, is obliged to renew or replace the utensils. The utensils are granted for a particular purpose, and at an adequate rent: hence the utensils must either be such as can last during the whole term of the tack, or must be repaired by the granter, for otherwise the subject would no longer exist. By the lease the tenant is bound to uphold, and to restore, and deliver back; therefore, the same utensils which are upheld are to be delivered back. The tenant cannot be said to deliver back new utensils which he never received. Neither can he be bound to keep in repair and deliver back in good condition, at the end of fifteen years, what may become useless in the course of five years. The exception of *wear and tear*, imports that the tenant may use the subject in the common way; so that, if by *wear and tear* any part becomes useless, he is not bound

to restore it in good condition. The sum of the suspender's plea is, that, although the tenant be bound to uphold the utensils as long as they can be upheld, yet, if they become useless, they must be renewed by the granter of the lease. If they were not to be renewed at all, the lease would be at an end : if they were to be renewed at the expense of the tenant, he would pay a rent for the subject, and at the same time be allowed to purchase the subject for which he paid rent.

ARGUMENT FOR THE CHARGERS :—

Clauses like that in controversy are frequent in the leases of breweries, and they are extremely reasonable ; for, were it not for such clause, a careless tenant might, in one year, bring a charge upon the proprietor equal to the rent of three years. The words of this clause are plain. Nothing is incumbent on the proprietor but to uphold the roofs. The words “tear and wear excepted,” does not imply an obligation to maintain and uphold ; neither do they apply to the currency of the lease, but only to its determination.

N.B. In this the Lords had an inquiry made into the practice of brewery leases ; but no satisfaction was obtained from inquiry.

On the 8th August 1766, the Lords adhered.

Act. J. Swinton, junior. *Alt.* D. Rae.

OPINIONS.

AUCHINLECK. Considered the exception of tear and wear as being to take place only at the issue of the tack. It has indeed been asserted, that it was the practice for the master to uphold the utensils ; but here there is an express paction to the contrary, and consequently usage is nothing.

PRESIDENT. Suppose a tenant bound to uphold and the house should fall, must he rebuild ?

KAIMES. If a man takes a country farm, and the houses are destroyed by fire, &c. the loss falls upon the landlord ; but a different case where the houses wear out, which is similar to the present *species facti*. The tenant must be presumed, on account of this burden, to pay so much less rent. As to the terms of this lease, the burdens are divided between the master and the tenant. Uphold and maintain is the obligation on each side, and must be explained in the same way. If the house or the brewing-looms be destroyed *casu fatali*, no rent can be paid ; because *casu fatali* there remains no subject. In such case the master must rebuild or replace ; otherwise he can have no claim for rent.

ALEMORE. By the clause the tenant is obliged to “uphold and deliver back, tear and wear excepted.” The setters, therefore, are not liable for new utensils.

PITFOUR. It is dangerous for one to uphold what another uses. Tear and wear is excepted ; but the clause will not oblige the tenant at the issue of the lease.

COALSTON. Where there is no special covenant, the setter upholds the subject. The question is, Whether has this rule been departed from in this case ? The clause does not bind to this extent. The tenant is bound to keep in sufficient repair. It is of great consequence to know in what sense this clause is generally understood, and in what sense the parties understood it. If there

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an no special obligation, the setter would have been liable. Here there
t words sufficient to relieve him from that obligation.

36. August 9. JAMES GRIERSON of Dalgoner, against ROBERT FERGUSSON
of Isle.

WADSET.

In a Declarator of Redemption, at the instance of a Singular Successor of the Reverser, found
not competent to the wadsetter to object to the pursuer's title to the right of reversion,
which was not claimed either by the heir or creditors of the reverser.

UPON the 9th June 1663, James Grierson of Dalgoner granted a wadset of
10 acres to Mr William Black, minister of Dalgarnock, redeemable on payment
of 900 merks, at any term of Whitsunday or Martinmas, even upon a premoni-
tion of 40 days. On this wadset Mr Alexander Fergusson, disponent of the son
of the wadsetter, was infeft in 1694. Fergusson of Isle is his son and heir.

In 1679, William Grierson, under the character of eldest son and heir ap-
parent of the reverser, granted a disposition of the estate of Dalgoner, compre-
hending the ten acres, in favour of James Grierson. In 1696, James Grierson,
the disponent, deduced an adjudication bears, that William had been charged to enter
heir in special to James Dalgoner, his father, and to ——— his goodsire, and
to ——— his grandsire. Blanks are left in the summons, not only for the de-
signations and names of those persons, but also for the date of the special let-
ters, date of the execution, and messenger's name. In the production, as
marked in the decret, the letters of special charge and the executions, are said
to have been produced, as of the date, tenor, and contents above-mentioned,
that is, as mentioned in the libel. From the records of the Signet Office, it ap-
pears that the bill for the summons of adjudication, premonished Fergusson
James Grierson, now of Dalgoner, served himself heir in general to the ad-
judger; and, having expedie a charter of adjudication, premonished Fergusson
of Isle to receive his money and consign it. Upon this he brought an action for
having it declared that the wadset lands were redeemed, as at Whitsunday 1765.

The wadsetter objected to the pursuer's title, and also to the form of the re-
demption. The Lord Auchinleck, Ordinary, "repelled the objection to the
pursuer's title, but sustained the objection to the order of redemption, in so far
as to prevent its taking effect at Whitsunday 1765; but found that the order al-
ready used is sufficient for redeeming the lands libelled at Whitsunday 1766."
On the 28th July 1766, the Lord Ordinary, "having considered a represen-
tation and answers, and, specially, that the adjudication objected to is in imple-
ment of a disposition, and that the objection is not moved by the heir of Wi-
liam Grierson, or by any of his creditors claiming right to the reversion, whi-

is adjudged; adhered to the interlocutor,—repelling the objections to the pursuer's title; and also adhered to the second point of the interlocutor,—finding the order of redemption used sufficient for entitling the pursuer to insist in the redemption.

Fergusson, the wadsetter, reclaimed; and the only thing material which he offered, respected the pursuer's title to redeem. As to this, he pleaded that the adjudication was null, there being no evidence of its having proceeded upon a special charge; for, although the decret bears production of such charge as libelled, yet the libel neither mentions its date, tenor, nor contents; and, further, that the bill for adjudication is still blank as to the lands. The defender has right to move the objection as well as the heir or the creditors of William Grierson would have had. A wadsetter is entitled to retain possession of the lands wadsetted, until they be regularly redeemed by the person having right to the reversion. Of consequence, he may object to the title of any one pretending to redeem. In like manner, when a reversion is to heirs-male, he may object to redemption used by heirs-of-line; or, if the right of reversion is assigned, he may challenge the title of the assignee: although, in the one case, the heirs-male should move no objection, nor, in the other, the disponent. It is, therefore, equally competent for the wadsetter to object against an adjudication in implement, although no objection be moved by the heir, or by the creditors of the person in implement of whose disposition such adjudication was led.

On the 9th August 1766, the Lords adhered.

Petitioner, A. Wight.

1766. November 14. ALEXANDER KEITH, late Provost of Aberbrothock, against JAMES MEIKESON and JOHN SHANK.

JURISDICTION.

An appeal having been entered before the Circuit Court of Justiciary, under the 20th of Geo. II., found not competent for the Court of Session to review their judgment in a Suspension, although the judgment was in absence.

ALEXANDER KEITH insisted in an action before the bailies of Aberbrothock against James Meikeson, for payment of L.7 : 9 : 7 sterling.

The bailies pronounced decret against Meikeson for the sum libelled, with one shilling in the pound of expenses.

Meikeson appealed to the Circuit Court at Perth, in terms of the statute 20th Geo. II., and John Shank became his cautioner.

He failed to insist in his appeal.

The Lords of Justiciary at the Circuit Court admitted protestation in common form; allowed the decret of the bailies to be put in execution, and decerned for L.1 : 19 : 6 sterling in full of expenses. They also ordained execution to pass.

Upon this judgment, and upon the decret of the bailies, Keith charged Meikeson and Shank his cautioner.

They suspended. Meikeson pleaded that most of the sum decerned for by the bailies was already paid. He also pleaded compensation upon an open account of L.8 sterling; and they offered to liquidate both defences, by referring them simply to the oath of Keith.

Keith OBJECTED, That the decision of the Circuit Court is final, by the Act 20th Geo. II., which provides, "That it shall be lawful for the party conceiving himself aggrieved by the sentence of the inferior court, to take and enter in open court, at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter within ten days, by lodging the same in the hands of the clerk of court, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the case; and serving in like manner the inferior judge himself, in case the appeal shall contain any conclusion against him by way of censure or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondent to attend and answer at the next circuit court that shall happen to be held fifteen days at least after such service; and thereupon the judge or judges, at such circuit court, shall and may proceed to cognosce, hear, and determine any such appeal or complaint by the like rules of law and justice as the Court of Session, or Court of Justiciary, respectively may now cognosce and determine, in suspension of interlocutors, decrees, sentences, or judgments of such inferior courts: but the said circuit court shall proceed therein in a summary way: And, in case they shall find the reasons of any such appeal not to be relevant, or not instructed, or shall determine against the party so complaining or appealing, the said judge or judges shall condemn the appellant or complainer in such costs as the court shall think proper to be paid to the other party, not exceeding the real costs *bona fide* expended by such party; and the decree, sentence, or judgment of such Circuit Court, in any of the cases aforesaid, shall be final."

"Provided always that wherever such appeal shall be brought, such complainer, at the same time he enters his appeal, as aforesaid, shall lodge, in the hands of the clerk of Court, from which the appeal is taken, a bond, with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded: And the clerk of Court shall be answerable for the sufficiency of the cautioner."

It was ANSWERED for the SUSPENDERS,—That the protestation admitted, and the judgment given, were in absence; whereas the Act founded on relates to *causes heard*, not to decreets in absence.

REPLIED for the CHARGER,—The Act says nothing of *causes heard*. Here the procedure was the same in form as before the Court of Session, but different in its consequences. Before the Court of Session the suspenders might have been reponed against such protestation, but not before the Circuit Court, whose judgment is final by the statute.

The reason of the difference is obvious: decreets in absence may chance to be pronounced before the Court of Session in the greatest causes, where, as decreet cannot be pronounced before the Circuit Court in causes beyond the extent of L.12 sterling; were such judgments to be suspended, that very expense would be incurred which the statute proposed to prevent.

By entering an appeal the appellant makes choice of a jurisdiction. The service of appeal obliges the respondent to answer. The appellant also is obliged to find caution *to answer and abide by the judgment*.

Were the respondent to allow decret-*absolvitor*, he could not apply for suspension, and the same must be the rule as to the appellant.

On the 14th November 1766, on report of Lord Hailes, Ordinary on the Bills, the Lords found the letters orderly proceeded.

OPINIONS.

BARJARG. The statute 20th Geo. II. meant to prevent suspensions of this nature.

PITFOUR. When the *cause is heard and determined*, the judgment of the Circuit Court is final, by the statute; but this relates not to judgments in absence, where the merits of the cause are not determined. In this there is no inconveniency, for, if parties tergiverse, expenses may be awarded.

PRESIDENT. The suspension is not competent. There was no occasion for a protestation. By the statute a new jurisdiction was introduced, and a cautioner to *abide by the judgment* was required. It is like an appeal to the House of Peers. The Court of Justiciary must hear the cause, and, if the appellant do not insist, must give costs. The thing under suspension is the decret of the Court of Justiciary. That is final, and cannot be reviewed by the Court of Session. If the Circuit Court shall determine against the appellant, and give costs, how can that determination be suspended? The original plan of the law was to bring every cause from the inferior court to the Circuit. This was afterwards altered, and the limitation of L.12 was introduced. But still it was understood that, if the party made his election of the Circuit Court, he could not go to any other.

KAIMES. An appeal dismissed *ob contumaciam* is not final. Suppose a man struck with palsy, and thereby disabled from attending, could not he suspend? The question is, was the party in fault or not?

AUCHINLECK. This is a new question, and upon a new law. The party might either appeal or suspend, but whichever method he followed, to that he must adhere; and the respondent had a title to pray the judgment of the Circuit Court. If there was any thing fraudulent on the part of the respondent, reparation lies by an action for damages.

JUSTICE-CLERK. The decret of the Circuit Court cannot be suspended. Protestation is a technical term adopted from the Court of Session. But still it is a decret of the Circuit Court. It is like a judgment pronounced by the House of Peers in absence. If there has been any fraud, it may still be corrected, possibly by reduction, certainly not by a suspension.

1766. November 14. ANN FORBES *against* SIR JOHN FORBES, Baronet.

HEIR AND EXECUTOR.

Fund, That a clause in a settlement, binding the heir to pay certain moveable debts, was intended merely for the benefit of the creditors, in case the executry should be insufficient for their payment, but did not entitle the executor, on his paying these debts, to claim relief from the heir.

JOHN Forbes of Knapperny, by Margaret Crawford, his wife, had issue two sons and three daughters. The pursuer, Ann Forbes, was the second daughter.

Margaret Crawford survived her husband and her two sons, but the eldest son left issue, the defender, now Sir John Forbes.

In 1747, Margaret Crawford executed a disposition, whereby she conveyed to her grandson, Sir John Forbes, certain heritable subjects, under this express burden and provision, "That the said John Forbes, my grand-child, and the heirs lawfully to be procreate of his body, or lawful assignees, after majority; whom failing, the other persons before named, succeeding in virtue of the substitution before-mentioned, *shall, by their acceptation hereof, be bound and obliged to content and pay all my just and lawful debts, legacies and funeral charges, and, in particular, the legacies after-mentioned, viz. the sum of 500 merks to Margaret Buchanan my grandchild,*" &c.

In consequence of this disposition, Sir John Forbes, upon his grandmother's death, entered to the possession of the heritable subjects disposed. Her executry fell to be divided among her three daughters.

Jean Forbes, one of the daughters, was confirmed executrix to her mother, and intromitted with her moveables. Out of them she paid debts to the amount of L.94 sterling, and divided the remainder betwixt herself and the other two daughters, in equal portions.

Ann Forbes, one of the daughters, insisted in an action against John Forbes, concluding for relief of the third part of the debts corresponding to her share of the executry. She laid her claim upon the burden and provision above-mentioned.

On the 11th July 1766, the Lord Kennet, Ordinary, assoilyied the defender.

On the 31st July 1766, he "found, that although the said clause gave access to the creditors of Margaret Crawford to pursue Sir John Forbes for payment of her moveable debts, yet it does not lay the burden thereof ultimately upon him, nor oblige him to free Margaret Crawford's executors from paying those debts."

Ann Forbes preferred a reclaiming petition, and *pleaded* that the settlement, by Margaret Crawford, of her heritable subjects upon Sir John Forbes, her grandson, was absolutely gratuitous, and that she meant to burden this gratuitous settlement with the payment of her debts, whereby her small fund of executry might remain entire to her three daughters.

The plea urged by Sir John is, that the debts, being moveable, ought to be paid out of the moveable succession, and that the clause in question imports no more than a security for creditors in case the fund of executry should prove short : That so it was determined, *Russells against Russell*, 23d January, 1745, and *Campbell against Campbell*, 12th June 1747.

To which it is ANSWERED,—That it is not disputed that moveable debts are to be paid out of executry. But this is always upon the supposition that the testator does not will otherwise ; but here the testator had no such will concerning the payment of her debts. She did not provide, nor had any occasion to provide, for the security of her creditors. Her creditors were safe, whether their payment was to be operated out of her heritables, or out of her moveable subjects. The two cases quoted for Sir John Forbes do not apply. In the first the clause ran thus,—“ I hereby expressly burden this right and disposition, not only with the payment of my funeral charges,” &c. The other thus,—“ And further, it is hereby expressly provided and declared, that the said Dugal Campbell, &c., shall be holden and obliged to pay the portions and provisions.”

In these two cases the clauses were so conceived as to show that nothing more was meant than an additional security to creditors ; and it is to be remarked, that in both these cases the debts were considerable, and the funds of executry small. But here the clause is conceived in words more definite and more obligatory upon the heir, “ *they shall by their acceptance hereof be bound.*” This implies an election offered to the heir, either to repudiate the succession altogether, or to accept it under such condition ; and, as the heir has accepted, he must perform the condition, for that condition is a mode of his right.

On the 14th November 1766, the Lords refused the desire of the petition, and adhered to the Ordinary’s interlocutor unanimously.

1766. November 18. WILLIAM GEORGE SIMON DAVID ROSS *against* WILLIAM ROSS, *alias* MONRO.

IRRITANCY.

An heir of entail allowed to purge an irritancy, after an action was brought by the next substitute in the entail for declaring the same.

[*Faculty Collection*, IV. 79 ; *Dictionary*, 7289.]

ON the 23d May 1722, William Ross of Aldie executed an entail of the lands of Aldie in favour of Simon Ross, his son, and the heirs-male of his body ; whom failing, to certain other substitutes.

This entail contains the following proviso,—“ That all the heirs of tailie and provision therein mentioned, and the descendants of their bodies, who shall happen to succeed, according to the said destination, shall be obliged to assume, and constantly use and bear the surname of Ross of Aldie, and arms

of the family of Balnagowan, without any alteration or diminution whatever, as their proper surname, designation, and arms, in all time after the said succession, upon pain of incurring the irritancy under-written."

The entail contains other prohibitive, irritant, and resolute clauses, such as, that the heirs should only enjoy the estate in virtue of the entail, and that they should timeously enter and infest themselves.

It also contains a clause irritating the right of the contravener, and declaring, "That the person so contravening or failing to follow the conditions above-mentioned shall, for himself alone, immediately upon the contravention and failing to fulfil the said provisions and conditions, or any one of them, amit, lose, and tyne, for the committer's person alienarly, all title or right which he hath, or can pretend to the said lands or estate, and the same shall, in the case foresaid, *ipso facto*, fall, accresce, and pertain to the next heir or member of tailie appointed to succeed thereto; and sicklike, and in the same manner, as if the contravener were naturally dead, or had not succeeded in the tailie."

On the 7th June 1722, this entail was registered, and Simon Ross, the institute, having expedite a charter thereon, under the great seal, was infest in the lands.

In 1750, Simon Ross died. His son William, now the defender, entered into possession, and, without making up titles, still continues to possess.

On the 8th December 1747, Colonel John Monro of Newmore executed an entail of his estate, in favour of Mrs Mary Monro, his sister, and the heirs-male of her body; whom failing, to Mrs Ann Monro, also his sister, spouse of Simon Ross of Aldie, and the heirs-male of her body; whom failing, certain other substitutes.

This entail provides, That the heirs succeeding in virtue thereof should assume, and ever thereafter use, the name and arms of *Monro*, and the title and designation of *Newmore*, without joining or bearing any arms, name, or title therewith.

These provisions are fenced with the usual irritant clauses of the contravener's right. Yet every heir is left at full liberty to contract debts upon the estate, or to sell it. On the death of Colonel Monro, his sister Mary expedite a charter upon the entail, and was infest. By her death, in 1761, the succession opened to William Ross of Aldie and Ann Monro. He entered into possession, and, upon different occasions, assumed the surname and designation of Monro of Newmore.

Duncan Ross, the second son of Simon Ross of Aldie, being the immediate substitute in both entails, brought a process of declarator against his brother William, for having it found that he, by deserting the surname of Ross of Aldie, and assuming the name of Monro of Newmore, had, in terms of the entail, forfeited the estate of Aldie, which thereby devolved to the pursuer, as the next substitute in the entail.

The question was taken to report by Lord Strichen, Ordinary, and was enrolled in the Inner-House rolls, when Duncan Ross, the pursuer, died.

Meanwhile an attempt was made by Mary Monro more strongly to rivet the chains of the entail of Newmore than her brother the Colonel had done.

She executed an entail, whereby she laid her nephew William under prohibition to sell or contract debt.

After her death, the remoter substitutes brought an action of declarator against William for forcing him to make up his titles upon Mary's entail, and William brought an action for reducing that entail. The Court reduced it, and found the heir not bound to make up titles upon it.

The remoter substitutes did afterwards insist in an action for having William judicially interdicted on account of his facility.

This process terminated by a contract, in July 1765, whereby, on the one hand, William became bound neither to contract debts nor to sell the estate to the prejudice of the substitutes; and they, on the other hand, became bound not to claim the estate during his life, although he should take the name of Ross of Aldie.

Duncan Ross having died as already said, William George Simon David Ross, did, in December 1764, insist in a declarator against William, the possessor of Newmore and Aldie, containing the same conclusions as in the former summons.

The Lord Auchinleck, Ordinary, took the question to report.

ARGUMENT FOR THE PURSUER :—

In consequence of the arguments used by Duncan Ross, the present pursuer takes it for granted that the irritancy was once incurred by William when he assumed the name of *Monro*. He will therefore proceed to inquire, whether such irritancy can be purged after an action for declaring it had been brought into the Inner-house?

First, A legal irritancy may be purged at the Bar, but a conventional irritancy cannot. This rule is founded in the nature of things. Where the law imposes the penalty, it is natural that the law should give relief when the party is willing to perform, even after he is called before the Judge. But when the irritancy is conventional, it would be unjust for the law to interpose, or to alter the contract of parties. So speaks Sir George M'Kenzie, who having mentioned the difference between an irritancy *ob non solutum canonem*, provided by charter or declared by law, and after observing that the latter may be purged at the Bar, not the former, adds this reason :—"Because the express paction is thought a stronger tie than the mere statute," *B. 2, tit. 5, § 14*; see also Dictionary, title, *Irritancy*, p. 488. The only decision which seems to contradict this doctrine, does in truth confirm it. For *there* the exception was not made without a special reason. The decision is 18th February 1680, *Earl of Marr* against *His Vassals*, observed by Stair. *There* the vassal was allowed to purge the irritancy at the Bar, because there was an ambiguity in the feu-charter.

2dly, A feu-contract is no other than a perpetual assedation. The same distinction, therefore, is observed with respect to tacks, as Lord Bankton says, Vol. II. *B. 2, tit. 9, § 23*; and this is confirmed by many decisions in the Dictionary, title, *Irritancy*.

3dly, So also, in all bargains and contracts, conventional irritancies are not purgeable at the Bar, unless in very special cases. See Dictionary, Vol. I. p. 489.

Such being the general rule, it remains to inquire, Whether there be any reason for an exception in the present case?

And, *1mo*, With respect to entails in general, when he who confers his es-

tate on another by gift, and to such gift adjects a condition under a nullity, it is reasonable that his will should take place, and that he who willingly transgresses the condition should forfeit, and not, by a late repentance, be permitted to deprive the next grantee of his right: for, as Lord Stair observes, *B. 4, tit. 18, § 6*, "These clauses in tailies are not properly penal; for it was in the power of the constituent to assume, or not to assume these heirs of tailie to be his heirs, and therefore they are effectual. This distinguishes the case between entails and *pacta legis commissoriæ in pignoribus*, or conditions in wadsets; for wadsets are contracts, whereas an entail is a donation. See Dictionary, title, *Irritancy*, p. 486. And, accordingly, in the case of *Westshiel*, 1st February 1726, it was found that an irritancy in an entail could not be purged.

This was indeed altered in the House of Peers, but upon a separate *medium*, namely, that the irritancy had never been incurred at all.

The present case is stronger than that of *Westshiel*; for here the irritancy was plainly conventional, and incurred by the defender himself. It was not an act of omission, but of commission; nor is it a question *de damno evitando*, as was pleaded in the case of *Westshiel*, but *de lucro captando*, being a device to join two estates which the entailers meant should be kept separate. There is no distinction between the case of feus and of entails. Both are grants of lands under conditions. The condition of paying a feu-duty is not always easy,—that of bearing a name and arms is. Why then should a failure of performance be purgeable in the last case, and not in the former? The only decisions which seem to make for the defender, are two: the one 23d March 1686, *Drummond of Riccarton* against *Hamilton of Grange*; the other, 15th December 1698, *Baillie of Jerviswood* against *The Town of Lanark*. In the former decision, the Court would not sustain the irritancy of a feu-duty not being paid, against creditors who had adjudged the feu-lands, "although it was alleged that the irritancy had been incurred during the debtor's own life." This only proves what is certain, that no irritancy, unless declared against the person who has incurred it, will invalidate the right of a singular successor. In the other case, it appears that *Jerviswood* offered to perform before any declarator of irritancy was brought, and this is given for the *ratio decidendi*, which shows that, if a declarator had been brought, he could not have been received to purge the irritancy. It is true that no estate can be evicted for irritancy, without declarator, because the feudal right vested in the heir cannot be annulled without process. But this does not prove that whenever a declarator is raised the heir may purge.

As to another case which is mentioned for the defender, *Hamilton* against *Pryce*, it does not apply; for *there* no deed implying irritancy was done. The heir of entail contracted debt which was no irritancy. The creditor adjudged not only the liferent but the fee. The creditor was allowed to correct this adjudication, and to restrict it to the liferent, so that here it was not the heir who was restored, but rather the erring creditor.

In the case *Sir John Gordon* against *Mr Charles Hamilton Gordon*, Sir John was not in possession of *Hallcraig*. He complained that the possession was detained from him; and therefore, until he had made his right good, he might be excused from assuming the name of *Hamilton of Hallcraig*. But *here* the defender was in possession, and laid aside his own name and took another.

Neither will it vary the case, that the defender is in a state of apparency, for this is his own fault, as he ought long ago to have made up feudal titles.

ARGUMENT FOR THE DEFENDER :—

The heir of Aldie is required to bear the surname of Ross of Aldie, “without *diminution* or *alteration*.” Now, supposing that the defender has borne the name of Monro of Newmore, this is no *diminution* or *alteration*.

But further, the condition is imprestable. “To bear the name, &c. of Balnagowan” is *one* condition. It is impossible for him to perform that part of it, as to *arms*, for he has no right to assume the arms of another family. Thus, suppose that *Aldie* were a small part of the estate, giving the title to the family, and that it should be evicted, the defender could not carry it after eviction.

The defender, while in a state of apparency, could not irritate, by not bearing the name of the lands. While the lands are *in hæreditate jacente*, how can any one bear the name?

As to the distinction between irritancies legal and conventional, the practice, in later days, has been moderated, and this distinction has been often departed from, especially upon any probable excuse for delay or neglect.

This case is confirmed by what Lord Stair says, b. 4, tit. 8, § 7.

But, whatever doubts may have been of old, the decisions *Sir John Gordon* against *Hamilton Gordon* and *Hamilton* against *Pryce* are in point. In the last case, the debts were not only contracted by the heir, but the creditors were in possession.

The case of *Westshiel*, as determined by this Court, was circumstantiate, and every *ratio decidendi* was conjoined in the judgment. The judgment was reversed upon a ground which left no opportunity of trying the question now in issue; and, at any rate, the decisions *Sir John Gordon* and *Pryce* are to be preferred, as more recent.

It is *jus tertii* for the pursuer to plead that the two estates of Aldie and Newmore were meant to be kept separate. The entailer of Aldie never meant that his heir should not enjoy any other estate whatever, providing the conditions in his own entail were fulfilled. The substitutes in the estate of Newmore might make that plea which the pursuer makes; but, on the contrary, they have become bound not to make it.

On the 18th November 1766, the Lords “sustained the defences and assoilied.”

Act. J. Burnet. *Alt.* A. Lockhart, R. Affleck.

OPINIONS.

PITFOUR. William has no good excuse for not complying with the entail. He must take the arms of Balnagowan as far as he can take them. I am not clear as to the defence of not being entered. Heirs of entail ought to make up titles. As to the other defence, supposing me to have been in a mistake, may I not purge? Every irritancy that is purgeable may be purged. If the defender should insist that he is still entitled to take the name and arms of Monro of Newmore, then judgment might go against him. The provision made would have been effectual, had not the substitutes of Newmore granted a dispensation; at present there is no question with respect to the irritancy of Newmore. The

permission to purge is agreeable to decisions. The case of Pryce is a strong one. The only decision to the contrary is that of Westshiel. I have seen many settlements where there have been blunders that would have occasioned irritancies. My constant advice was to make up a new, clear title.

JUSTICE CLERK. As the defender has done no prejudice to the estate, and is willing to submit to the entail, his plea ought to be received. The plea of the pursuer cannot be good, unless in so far as the presumed will of the donor is considered; and it cannot be conceived that, in a case so circumstanced, he would have required such an irritancy. The donor finding the *prædilecta persona* in his present situation would not carry over the succession to a person less favoured.

PRESIDENT. Of the same opinion. I do not love penal irritancies in entails. These are different from conventional irritancies.

AUCHINLECK. The only difficulty is, that there is no proper excuse for the neglect on the part of the defender. If this defence is good, then there is an end put to every process of this nature. For, if a man was never to be precluded, to what purpose bring the action? He may change backwards and forwards as often as he pleases.

COALSTON. There are two questions here. *First*, Whether an irritancy has been incurred? *Secondly*, Whether the heir can be reponed against it? As to the *first*, I doubt whether an apparent heir of entail can commit an irritancy, and how far he can be bound to an impossibility, that of bearing the arms of Balnagowan. We cannot explain this condition to imply arms with a mark of cadency, for this were to create an irritancy. *Adly*, As to purging, there is indeed an old act of sederunt, of which I never could see the reason. I am never for extending irritancies.

KAIMES. The first thing to be considered is the tenor of the entail. There are no words in it implying that it was the intention of the entailer to declare the irritancy not purgeable. At present there is *bona fides* on the part of the defender, but there can be no *bona fides* after the judgment of the Court.

1766. November 19. The MERCHANT COMPANY and TRADES of EDINBURGH
against the GOVERNORS of HERIOT'S HOSPITAL.

HOSPITAL.

Who entitled to call the Governors of an Hospital to account? Whether the Governors have power to feu out the Hospital lands? Whether the Court of Session may establish rules for the future administration of the affairs of an Hospital?

[*Faculty Collection, IV. 46 ; Dictionary, 5750.*]

IN 1623, George Heriot, jeweller to King James the VI. executed a deed of settlement, whereby he gave certain subjects to the Magistrates and Town

Council, and Ministers of Edinburgh, and appointed them his feoffees *in trust*, for founding an hospital, and for purchasing lands in *perpetuity*, to be employed in the maintenance of certain poor boys.

He ordered that the hospital should be erected and governed in such form as should be set down by himself, or, in default of him, by Dr Walter Balcanquhal, Dean of Rochester.

As Heriot omitted to draw up those statutes, they were drawn up by Balcanquhal.

By him he ordered that a sum should be kept in the treasure-house of the Hospital sufficient to pay all common charges; and that all the money which, by debts, rents, or any other way shall belong to the Hospital, besides that which shall come into the stock of the treasure-house, "shall be bestowed upon lands and no otherways, for all time to come hereafter."

The majority of the Merchant Company, &c. brought an action against the governors. It contained many conclusions, and particularly that it should be declared that the governors have no powers to alienate or grant feus, or long leases beyond a certain term, of the lands belonging to the Hospital, but that the same ought to remain in perpetuity with the hospital; and that, supposing them to have such power, the said feus and long tacks ought to be granted only by public roup to the highest offerer, and that under such regulations as should seem meet to the Lords of Session: that the prices to be got for those feus, or the compositions for entries, and grassums for leases, ought not to be spent or dilapidate along with the common or annual revenue of the Hospital, but to be stocked out as a capital, bearing interest until the proper purchaser offer.

On the 9th August 1765, the Lords found that the governors of the Hospital had "power to feu out the lands belonging to the hospital, and concluded that this general expression. Assuilies the defenders from the other declaratory conclusions of the libel."

The pursuers applied by petition, and prayed a rectification of this interlocutor, as expressing more than was intended, and as giving judgment on certain points which the Court had not considered.

On the 13th December 1765, the Court adhered: "but added this reservation, without prejudice to the parties, to be heard before the Ordinary, if the managers of the Hospital can alienate the feu-duties, or any part thereof, belonging to the Hospital; and upon that part of the conclusions of the pursuers' libel, which runs, *That the prices to be got for these feus or the compositions for entries and grassums for leases, ought not to be spent or dilapidated along with the common or annual revenue of the Hospital, but to be stocked out as a capital, bearing interest until a proper purchaser offer.*"

The Lord Auchinleck, Ordinary, took the questions to report.

ARGUMENT FOR THE PURSUERS:—

The first point is, Whether the Managers of the Hospital can alienate the feu-duties or any part thereof?

The solution of this question must depend upon the nature of the right meant to be vested in the Managers. The deed of settlement executed by Heriot, terms them *feoffees in trust*; and the lands purchased are to remain,

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by his will, in *perpetuity* with the Hospital. So also Dr Balcanquhal provides, that all moneys be *bestowed upon land, and no otherways*.

A power to feu does not imply a power to alienate the feu-duties. Magistrates of royal boroughs have the former, but not the latter power. The same was the case of ecclesiastical persons. They might feu under the authority of the Pope, or of the King, but they could not alienate feu-duties.

A grant in feu-farm is indeed an alienation, as it conveys the *dominium utile*, but still the *dominium directum* remains; and this is consistent with the notion of the lands belonging in perpetuity to the Hospital: but when a sale of feu-duty is made, both the *dominium utile* and the *dominium directum* are conveyed away, and nothing remains but the price of the lands; so that it matters not, whether the lands be sold at once, or the lands be first feued out and the feu-duties afterwards sold.

The defenders plead, that the allowing the feuars to purchase part of the feu-duty, is no alienation; that the tenants pay three bolls of barley *per acre*; that the Governors feu at five bolls of barley *per acre*; and allow the feuar, within twelve months, to be relieved of one of the additional bolls, by paying for that at the rate of 26 or 30 years' purchase: that this is no alienation, but only implies that the revenue of the Hospital shall be either augmented by two bolls, or only by one, the value of the other being paid to the Hospital.

The fallacy of this argument lies in this, that the defenders do not distinguish between the actual yearly rent payable by the tenant and the actual yearly worth of the lands. Every one knows that three bolls of barley *per acre*, although it may be the rent, is not the yearly worth of lands in the neighbourhood of Edinburgh; and *this* the defenders themselves show, when they acknowledge that they grant feus at five bolls of barley *per acre*.

By the defender's argument, if the present rent is three bolls *per acre*, they may alienate every thing beyond that value.

Supposing five bolls to be the yearly value, the relief which is given to the feuar is precisely an alienation of twenty *per cent.*; for he who, being possessed of L.100 *per annum*, assigns away L.20 *per annum*, does evidently sell one-fifth of his estate.

How can the Governors claim a partial, and not a total power of alienation?—Both must depend upon the same principle.

The defenders acknowledge, that they are not allowed to lay out any part of the yearly revenue for the purpose of inclosing. But they contend, that they so lay out the feu-duty sold, for which they draw six *per cent.*,—that is, they bestow part of the yearly value upon inclosing,—though the founder permits them not to bestow part of the yearly revenue upon inclosing. The question is not what is best for the Hospital, but what it is which the Managers are authorised to do by the statutes? If the statutes limit them too much, the intervention of the Legislature is necessary for extending their powers.

It is however doubtful whether improvements, if consisting in houses, be beneficial. This may encourage tenants to build elegant houses, and then, upon a pretence of their having expended money of their own, to lay a claim for a feu of their leases.

The next question is, Whether the prices to be got for feus, or the compo-

sitions for entries and grassums for leases, ought to be spent or dilapidated along with the common or annual revenue of the Hospital, or ought to be stocked out as a capital bearing interest, until a proper purchaser offer.

This is expressly enacted by Balcanquhal. *To bestow upon land*, means for the purchase of lands; and so the Governors themselves, by various acts, have understood, when they ordered that the price of feus and of compositions should be turned into a capital sum, and not expended as yearly revenue.

As the necessities of life increase in value, so also will the value of lands; but, from feued lands, no increase can be expected.

The common charges must be always paid; but this is provided for by the statutes.

ARGUMENT FOR THE DEFENDERS:—

A declaratory judgment, by way of prevention, is not competent. A judgment now pronounced, would not be *a res judicata* against any other set of pursuers.

The power of feuing implies a power of alienation. If the Governors alienate improperly, there will lie a personal action against them.

The proceeds of the feu-duties sold, are applied for the benefit of the Hospital. Its revenue is thereby increased, and an additional security is given for the payment of that revenue; besides, it is for the public utility that the lands be so improved, for the Governors themselves cannot improve them.

The expression in the statutes, "*bestow upon lands*," does not prohibit the spending of money for the improvement of lands. What is bestowed on inclosing, is bestowed on lands.

The acts of the Governors show, that they have been willing to give reasonable obedience to the statutes: so that there is no cause of complaint.

The compositions have been generally expended, as parts of the casual revenue; and most properly so, for such compositions are a casual revenue.

It is fit to observe, that a boll of barley, at an average for 20 years back, is 12s. 6d. in value; so that a rent of five bolls is £3:2:6, a high rent for lands uninclosed, even in the neighbourhood of Edinburgh, and there is hardly any example of the rent being raised by subinfeudations.

On the 19th November 1766, "The Lords found, That the Governors of Heriot's Hospital having granted feus, empowering the feuar, by the feu-contract, to purchase a relief from the payment of one boll out of five of the feu-duty, at a price from twenty-six to thirty years' purchase of such fifth boll, was a lawful act of administration; and that the laying out the money thus arising from such sales, on the compositions of entries and grassums for leases lawfully granted, upon the inclosing the Hospital's lands, or receiving six *per cent.* from the tenants, was properly applied: and assoilyied, but found no expense due."

Act. A. Wight, A. Lockhart. *Alt.* R. Blair, J. Montgomery. *Rep.* Auchinleck.

1766. November 19. JOHN AITKIN of Thorntoun, Assignee of Michael Storar, against JAMES MALCOLM of Balbeadie.

PREScription.

What circumstances sufficient to interrupt the Negative Prescription.

On the 8th May 1703, Michael Malcolm of Balbeadie granted bond for 500 merks to Michael Storar in Kilgour, payable at Whitsunday 1703. On the 15th November 1709, Michael Storar assigned this bond to John Storar, his son.

On the 13th March 1711, in consequence of a marriage-contract between Mr George M'Kenzie and Margaret, the daughter of Michael Malcolm, an inventory of Balbeadie's debts was made out, and signed by him. In this there occurs the following article:—To John Stow, £333: 6: 8 Scots, *i. e.* 500 merks. This Michael Malcolm executed an entail, by which he provides, that it shall not be in the power of his heirs of entail, to sell, nor to contract debts. The entail declares all such deeds void, and forfeits the right of the contravener. It reserves power to provide wives and younger children.

It declares that none of the heirs of entail shall suffer adjudication, or other legal diligence to be had and done against the said lands, or any part thereof, for debts *warrantably contracted*. At least, they shall be holden and obliged to purge and redeem the same, two full years before expiring of the legal reversion, under pain of forfeiture. Provided, nevertheless, that it shall be free and lawful to the said heirs of tailie, or their foresaids, to sell, &c. as much of the lands as may, by the price thereof, sufficiently satisfy and pay the debts *warrantably contracted*, in manner foresaid, which shall be resting for the time, with annualrent, until the said heirs of tailie can validly and legally dispose thereof to that effect.

In 1748, Michael Storar, assignee of John, insisted in an action on the passive titles before the Sheriff of Fife, against Michael Malcolm of Balbeadie, nephew and heir of old Michael, for payment of this bond, with interest from Whitsunday 1741.

Michael, the second, denied the passive titles; and, the 23d August 1748, Storar obtained decret in terms of his libel.

On the 19th November 1751, Michael Malcolm granted a bond of corroboration to Storar. After having mentioned the original bond, decret and assignation upon it, the bond of corroboration recites,—“That the principal and interest, from Martinmas 1748, were still unpaid, and that Storar, the creditor, was willing to supersede diligence until Whitsunday 1752, on Balbeadie's granting him the bond of corroboration.” Balbeadie, therefore, without prejudice of the original bond, obliged himself, his heirs and assignees, to pay the said sum at that term.

Michael was succeeded by his son James Malcolm: Storar wrote a letter to him, demanding payment.

On the 24th November 1758, James Malcolm returned this answer:—"As for paying your annualrent, or principal, at present, is what I cannot do; but I shall write you the time you may expect it, which I hope will not be long. If you have an opportunity of going to Edinburgh, you would speak to Mr David Orme, writer there, he would let you know the time you would get your money."

Storar, upon a narrative of value, assigned his grounds of debt to John Aitken of Thorntoun, and he insisted in an action against James Malcolm for payment.

The Lord Barjarg, Ordinary, took the question to report.

The general defence was, That James Malcolm represented his father in no other way than as an heir under a strict entail, and that the bond had been lost by the negative prescription, before the decreet 1748, or the bond of corroboration 1751.

ARGUMENT FOR THE PURSUER :

First, The entail does not cut off the debt, supposing it to have been contracted by Michael, the second, of Balbeadie. By the entail there is an exception of debts *warrantably contracted*; which, not being explained particularly, may be construed to imply all such obligations as the heirs of entail may come under for causes truly just and onerous.

Secondly, Prescription did not run out prior to the corroboration. That the debt was due in 1711, appears from the inventory of debts. The slightest grounds are sufficient to bar the odious defence of negative prescription. A debtor's promise to pay annualrent has been found to interrupt the negative prescription of a bond; *Skene against Campbell, February 1686*, observed by Harcarse. If his promise to pay annualrent be sufficient, certainly his formal acknowledgment that the debt is due will be sufficient.

But further: Michael, the second, suffered decreet to go against him in 1748, when interest was only charged from 1741. This shows that the prior interest had been paid, and consequently the prescription could not begin to run till 1741. No law requires that the payment of interest shall not be proved otherwise than by receipts which remain in the hands of the debtor. Michael, the second, had the same cause for proponing the defence of prescription which the defender now has. But he did not propone it. If more interest had been due at that time, the creditor would have demanded more.

This argument cannot be eluded unless the defender will prove his father to be guilty of fraud.

Thirdly, If the negative prescription be founded on dereliction, as the defender pleads, then he must admit the consequence, that it does not extinguish the debts, but only affords an extrinsic exception against the creditor, on account of his neglect. The debt therefore is unextinguished, and is still due by Michael the first: it is not a new debt created by Michael the second. And this leads to another consideration.

Fourthly, That the granting the bond, 1751, was not a deed of contravention. It was a debt warrantably contracted by the entailer, and the heir was bound to pay it, and the bond of corroboration therefore was no diminution of the entailed subject.

Fifthly, Whatever may have been the case originally, the defender, by his letter 1758, promised to pay the debt, and has departed from his defences.

ARGUMENT FOR THE DEFENDER :

First, The pursuer's plea renders the entail elusory. By debts *warrantably contracted*, he meant debts effectual in law, as those of the entailer, or effectual in virtue of the deed itself, as provisions to wives and children.

Secondly, Prescription had run before the decret 1748 : no document had been taken upon it in terms of the Act 1469. The inventory 1711 could not create a right in favour of Storar, for it was no document taken by the creditor. Besides, the plea of negative prescription supposes that the debt existed during the currency of the years of prescription. The inventory can only show, that in 1711 the debts existed, which is not denied.

Payment of annualrent is a document taken by the debtor ; but of such payment no evidence is here offered. The decret 1748 could not revive a debt already extinguished.

Thirdly, If the debt was extinguished in 1748, whether *ipso jure* or *ope exceptionis*, it could not be revived in 1751 by Michael, the second, an heir of entail.

Fourthly, The letter 1758 was wrote by the defender, while a stranger to his own affairs. He had heard of a decret obtained for a debt of his grand-uncle, the entailer. He supposed that he himself was liable in that debt. But at any rate, if prescription had already run, his writing the letter would not revive the debt.

On the 19th November 1766, " the Lords found the defender liable for the original bond, but not for interest preceding Whitsunday 1748 ; in respect that the pursuer restricted his libel as to interest before that period."

Act. A. Rolland. *Alt.* D. Græme. *Rep.* Barjarg.

OPINIONS.

KAIMES. I will presume that there were receipts for annualrent, and these receipts would interrupt prescription.

PITFOUR. The heir of tailie could not contract debts. *Warrantably contracted* means debts either contracted by the tailyer or for provision of wives and children. The bond of no effect, but the action good, because the debt was acknowledged by the debtor in the signed inventory. This was a *document*.

KENNET. *Warrantably contracted* does not permit the heir of entail. The creditor pursuing, and saying that interest was paid, is an interruption. And this the debtor acknowledges, which implies a subsisting debt. The creditor could not have the receipts in his possession, and therefore implicitly refers to them as in possession of the debtor.

GARDENSTON. The acknowledgment in the inventory implies no more than what the existence of the bond implies. But the process in 1748 is enough. Had there been a decret, *in foro*, for expenses, there would have been no doubt. Here the debtor did equivalent, by granting a bond of corroboration.

AFFLECK. From the whole circumstances of the case it appears that there is a debt subsisting.

BARJARG. The debtor must allege dereliction before the creditor can be heard to prove interruptions.

1766. November 19. JANET ANDERSON *against* ALEXANDER DONALDSON and OTHERS.

HERITABLE AND MOVEABLE.

A Debt being secured by Adjudication, and the subject adjudged being sold; *found*, that the interest due upon the creditor's share of the price was heritable.

On the 13th June 1766, the Lords found that the pursuer, Janet Anderson, in virtue of the decret of this Court in 1729, is entitled to the sum of L.1000 Scots, as a part of the portion of 10,000 merks provided to her sister Elizabeth, by their father's contract of marriage, for which Elizabeth had adjudged his estate in the year 1726; and that the pursuer is entitled, in virtue of said adjudication, to insist for a decret of mails and duties against the said tenements, for such part of the accumulated sums contained in the adjudication as shall appear to arise from the said L.1000 Scots, and interest thereof, adjudged for; and decerned in the mails and duties accordingly.

In applying this interlocutor before the Lord Pitfour, Ordinary, a new question occurred between the parties. Nicol, the husband of Janet, lived for many years after the sale of Anderson's tenements. The question was, Whether the annualrents of Janet's proportion of the price, which run during the life of Nicol, belonged to Janet herself, or to Nicol *jure mariti*. It became of moment to determine this point; for, if those annualrents should be found to fall under the *jus mariti* of Nicol, and to transmit to his heirs, the defenders offer to prove that Geddes of Scotstoun made advancements to Nicol sufficient to compensate those annualrents.

On the 7th August 1766, the Lord Pitfour, Ordinary, found that the annualrents of the pursuer's share of the price did not fall under the *jus mariti* of her husband.

The defenders reclaimed, and pleaded in manner following:—All annual profits, whether arising from land or money, whether on moveable bond or heritable security, are, with respect to bygones, considered as moveable, transmit to executors, and fall under the *jus mariti*.

The only difficulty arises from the case, *Ramsay against The Creditors of Clapperton*, Dict. vol. 1, p. 13, where it was found that the whole sums contained in an adjudication, principal, annualrent, &c. fall to the heir, and not to the executor. Hence the pursuer argues, that her debt was secured by adjudication; that such adjudication is not understood to be cleared by the sale, unless the purchaser has paid the price; and therefore that the annualrent of her share of the price is to be held as heritable, in the same manner as the debt itself would have been heritable had no sale happened.

To this the following answer occurs. An adjudication is an absolute trans-

ference of the property in satisfaction of the debt, with a faculty of redemption within a limited time; meanwhile the debt is understood to be extinguished, and the land comes in place of it. Hence the right of the land must go to the heir of the adjudger; the bygone rents not levied, to his executor. By a judicial sale the land is adjudged to the purchaser,—the price to the creditors: thus, as, in adjudications, the land comes in place of the debt, so, in a judicial sale, the price comes in place of the lands; and consequently the interest of the price is on the same footing with the rent of the lands. In this view, the principles laid down in the case of the Creditors of Clapperton, agree with those laid down by the defender. As bygone rents of land go to the executors of the adjudger; so also, upon a sale, ought the bygone annual-rents of the price.

Although an adjudication be not purged by a sale, but remains an incumbrance upon the land until the price is paid, yet the incumbrance reaches no farther than to the share of the price allotted to the adjudger. The holder of the land, by paying that share, however small, disencumbers the land. Admitting, therefore, that this price, being a real burden, goes to heirs, and that it is upon the same footing with money heritably secured, the consequence is, that the capital must go to the heir, but the bygone annual-rents to the executor; and, of course, fall under the *jus mariti*.

On the 19th November 1766, “the Lords adhered, and refused the petition.”
For the Petitioner, James Ferguson.

OPINIONS.

PITFOUR. The petitioners compare an adjudication to a property in lands; whereas the decision, Creditors of Clapperton, considered it as a sale and the bygoners as an eik.

AFFLECK. Here the pursuer, who competes with the petitioners, has right to a share in the adjudication itself.

1766. *November 21.* COLIN CAMPBELL of Ederline, Trustee for Angus Campbell of Dunstafnage, *against* Mrs ISOBEL M'NIEL, LILIAS and MARGARET CAMPBELLS.

FIAR.—PROVISION TO HEIRS, &c.

1. The fee of lands taken to the father in liferent, thereafter to the son in liferent, and his heirs-male; whom failing, the father's heirs in fee, found to be in the father, and, after his death, in the son.
2. How far the father can burden, in favour of the children of a second marriage, an estate settled upon the son of his first marriage by that son's marriage-contract.

[*Faculty Collection, IV. p. 246; Dictionary, 4287.*]

NIEL CAMPBELL of Achnard, afterwards of Dunstafnage, had, by his first marriage, a son, Angus, and a daughter.

In 1727, he married a second wife, and settled competent provisions on her ; as also a provision of 6000 merks to the daughters of that marriage, one or more.

In the 1751, Angus Campbell, his son, entered into a marriage-contract with Margaret Campbell : To it his father Niel was a party, and became thereby bound to settle his estate of Dunstafnage, to which he had by this time succeeded, in favour of himself in liferent, and, after his decease, to Angus Campbell in liferent ; and the fee of the same, after both their deceases, to the heirs-male of the body of Angus ; which failing, to Neil's heirs-male. By this contract, Niel restricted himself from further burdening the estate with any debts, excepting such provisions as he should make to his children.

Niel, by his second marriage, had two daughters. He executed a deed in 1752, whereby he provided 4000 merks to the eldest, and 3000 merks to the youngest. This deed proceeds upon the narrative that it was just and reasonable that he should, in implement of the faculty reserved to him in his son's marriage-contract, condescend upon the provisions that he shall make to the children already procreated of his body.

He, moreover, reserved power to diminish this provision, if an heir-male should thereafter exist of his own body, and to augment it, failing heirs of his body.

Angus having no sons, and in a declining state of health, Niel thought proper to make several additions to the provisions in favour of his wife and his daughters of the second marriage.

The provisions made in 1752, and previous to that period, left a free income to the heir of between L.30 and L.40 sterling.

The additional provisions not only exhausted the income of the estate, but laid an annual burden of L.14 sterling upon it.

Niel died, and Angus, in name of a trustee, raised a reduction of those additional provisions, as *in fraudem* of the marriage-contract in 1751. A question occurred, whether Niel or Angus was fiar.

On the 14th January 1766, the Lords pronounced the following interlocutor, on report of Lord Pitfour : " The Lords repel the objection to the pursuer's title, and find that the fee of the lands was in the father, and after his death in the son ; and remit to the Lord Ordinary to hear parties' procurators further on the value of the estate, and extent of the debts affecting the same, and to do therein as he shall see cause."

The Lord Ordinary, having adjusted the yearly value of the lands, and the extent of the burdens imposed by Neil, again reported the cause.

ARGUMENT FOR THE DEFENDERS :—

Neil was fiar of the estate, and had, from the nature of his right, a reasonable power of providing for his wife and daughters. The additional provisions which he made are not exorbitant. The defenders are willing to produce a person who will take a long lease of the whole estate at L.300 per annum, or buy it at the rate of L.10,000. By such lease or sale there will remain more than a competency to Angus Campbell, who has not any male issue, and in all probability never will have any. It is more reasonable that the provisions made by Niel in favour of his wife and daughters should be sustained, than that they should be reduced to straits in order to secure a more lucrative succession to the distant heirs-male of Niel.

ARGUMENT FOR THE PURSUER :—

The additional provisions are exorbitant : not in themselves, but from the circumstances of the case ; for, according to the defender's own state of the matter, they cannot be rendered effectual but by a total lease of the estate, which would expel Angus Campbell from his paternal habitation ; or by a sale, which would annihilate an ancient family. The powers to burden, consistently with the marriage-contract 1751, must be rationally interpreted, or, as it is expressed in England, *salvo tenemento*. Angus, the *predilecta persona*, must not be overburdened. The family and representation of Niel must not be annihilated.

On the 20th November 1766, the Lords reduced the additional provisions granted since 1752.

Act. A. Lockhart. Alt. H. Dundas. Rep. Pitfour.

OPINIONS.

COALSTON. No power to provide the wife farther than already provided. Power as to the daughters is of reasonable provisions for supporting the provisions made down to 1758.

AFFLECK. The wife can have nothing but what she was provided to by her marriage-contract : every thing else is beyond Niel's power. As to the daughters, the provisions must be rational. A man who has an estate must uphold it. A man's expenses must be adapted to his annual income, not to the saleable value of his estate.

PITFOUR. No provisions ought to be excessive. No one is obliged to sell : But, if a man has not sufficient funds for paying his father's debts, he cannot say I will not sell. He mentioned the case of Craik of Deuchrae. Here there is a passive title by the Act 1695 and the Act of Sederunt.

PRESIDENT. A right of burdening can never imply a right to sell. There is a difference between debts for which a creditor may adjudge, and rational burdens :—case of *Sir John Dalrymple*. Provisions cannot be rational when the estate must be sold. The case of *Craik* is very particular. There, there was a decreet-arbitral pronounced in minority. On attaining majority the young lady revoked it, and was thereby in the event reduced to beggary. The judgment of the House of Peers, appointing the Court of Session to give her a competent provision, was unexampled. This decision is not to be repeated.

JUSTICE-CLERK. The deed 1728, in favour of Isobel M'Niel, is a gratuitous provision by the husband, and not an implement of the minute 1727. It was therefore revokable, and, by the contract 1751, was revoked. Provisions must mean rational provisions : for how could Niel settle the estate on his son and leave himself power to burden to any extent. The provisions to the children must be reasonable. There is no better rule than that in 1752, which the father deliberately executed. The grounds of the posterior provisions are not sufficient. The representative of the family ought to have been left in a comfortable situation, in so far at least as was consistent with the duty owing to the younger children.

GARDENSTON. The wife cannot have any thing beyond her marriage-contract.

KAIMES. The wife's jointure must be according to the marriage-contract, and the provisions to the children according to the deed 1752. How is the restriction in 1751 to be interpreted in favour of the heir of the marriage, or of strangers? I think, as to the heir of the marriage, it may be good. As to strangers, Niel was left at liberty.

Diss. Pitfour.

1766. November 20. MARGARET MATHIESON and ANDREW MILLER of Kindie, her Husband, *against* JOHN MATHIESON of Benagefield.

PRESUMPTION.

Found, that an after provision to a child must impute in payment of a former provision, though not purified at its date.

[*Faculty Collection, IV. p. 271 ; Dictionary, 11,453.*]

On the 16th January 1730, a marriage-contract was executed between John Mathieson, then younger of Benagefield, and Elizabeth M'Kenzie. His father, Alexander Mathieson, and her father, William M'Kenzie of Balmaduthy, were parties in this contract.

By it the lands of Benagefield, and others, amounting to L.100 sterling per annum, were settled on the heirs-male of the marriage, which failing, to return to Alexander Mathieson and his heirs-male.

This contract did also contain the following clause :—“ And because the heirs-female to be procreated of the said marriage, are, by the contract, debarred and secluded from succeeding to the said John Mathieson in his lands and estate ; therefore, and in case there be no heir-male of the said marriage who shall succeed to the said John Mathieson in his lands and estate, they, the said Alexander and John Mathiesons, bind and oblige them, their heirs and successors, to make payment to the eldest or only daughter to be procreated of the said marriage, of the sum of 6000 merks, Scots money, and that within year and day of her marriage, with 1000 merks of liquidate penalty, in case of failie : together with the due and ordinary annualrent of the said principal sum, yearly and termly, during the not payments thereof, after the same falls due, providing, notwithstanding, that, if the said eldest or only daughter of the said marriage shall marry without the consent of the heirs-male of the said William M'Kenzie of Balmaduthy, and Alexander Mathieson of Benagefield, first obtained thereto,—the said provision to the said daughter shall, and hereby is declared to be restricted to the sum of 3000 merks only ; and which previous consent is to be expressed by the said heirs-male their being subscribing witnesses to the said daughter's contract of marriage, or by some other deed in writing, in case they cannot conveniently be present on subscribing the said contract.

In 1754, Margaret Mathieson, daughter of John, was married to Andrew Miller. At that time, Alexander Mathieson, her grandfather, was dead, but both her father and mother were alive. The father of the bridegroom and the father of the bride were parties to this antenuptial contract of marriage. By it John Mathieson became bound to pay to Andrew Miller, his heirs, successors, and assignees, in name of tocher, the sum of 3000 merks at Martinmas 1754. In this contract there is no reference made to the contract 1730, nor any general discharge of provisions.

At that time the heir-male of Balmaduthy was a minor. The next immediate heir-male was absent from Scotland, but the heir-male next to him signed witness to the contract. It is to be observed, that Balmaduthy, on his attaining majority, ratified the marriage 1754, as that seemed to be required by the marriage-contract 1730. After the marriage 1754, Elizabeth M^cKenzie died, leaving issue four daughters, whereof Margaret was the oldest.

Margaret Mathieson, with concurrence of her husband, brought an action against her father, John Mathieson, concluding for payment of the 6000 merks provided by the marriage-contract 1730, to the *eldest or only daughter*.

Lord Kennet, Ordinary, took the debate to report.

ARGUMENT FOR THE DEFENDER:—

The pursuer, as *eldest* daughter of the marriage, has no right to 6000 merks, for she is not only daughter also. The 6000 merks were intended for the whole female issue of the marriage, and not for the *eldest* daughter alone.

The words, *eldest or only*, are in the marriage contract considered as synonymous. The whole female issue were intended. Thus, by an after clause, in the event of an heir-male of the marriage succeeding, mention is made of the *eldest or only daughter*, and the defender is taken bound to educate the *eldest or only daughter* according to her degree.

As a father is naturally bound to aliment the younger daughters as well as the eldest, the word *eldest* and the word *only* must have the same meaning; and the sense is, that, although there be but one daughter, she should be entitled to the whole 6000 merks; but, if there more than one, the eldest could not in any just construction carry off the whole.

There is no example of a marriage-contract whereby a large provision was settled to the eldest daughter and nothing to the younger daughters; more especially when the eldest daughter is not to succeed to any land estate.

As there are four daughters of that marriage, and a son and a daughter of another marriage, if the eldest draws 6000 merks, the younger children cannot be provided at all out of so small an estate. The 3000 merks, which she has already received, is her full proportion.

But, *2dly*, Supposing her a creditor for the 6000 merks, yet she cannot demand it, by reason that that sum was granted under a condition which has not existed. The contract 1730 provides, "that, if the *eldest*, or only daughter of said marriage, shall marry without the consent of the heirs-male of the said William Mackenzie of Balmaduthy and Alexander Mathieson of Benagefield first obtained thereto, the said provision to the said daughter, shall, and hereby is declared to be restricted to the sum of 3000 merks only, and which previous consent is to be expressed by the said heirs-male their

being subscribing witnesses to the said daughter's contract of marriage, or by some other deed in writing, in case they cannot conveniently be present at subscribing the said contract.

Now the heir-male of Balmaduthy did not adhibit a previous consent; and, though the defender consented, yet his consent must be understood as implying that the 3000 merks was to be in full of every provision.

The terms of the provision must be strictly interpreted, as the tendency of the present claim is to carry off a much larger sum than was meant to be bestowed on the pursuer.

Thirdly, The 3000 merks given in her marriage-contract 1754, must impute *pro tanto in pay* of the 6000 merks. It is a rule universally established, that *debitor non presumitur donare*. See *Dict. tit. Presumption*, § 2, p. 146; and if the father was a debtor to his daughter in the provision of 6000 merks, he must be understood to have advanced the 3000 merks as a partial payment.

ARGUMENT FOR THE PURSUER :—

As to the *first* defence, the construction put upon the marriage-contract is contradictory to the words there used. The word *eldest*, and the word *only*, can never be synonymous, for eldest supposes that more than one do exist. The idea of primogeniture runs through the contract; in it no provision is made for younger sons more than for younger daughters.

As to the *second* defence, the heir of Balmaduthy did not previously consent, because at the time of the marriage he was a minor. It could never be the intention of parties that Margaret Mathieson should marry without a portion, in case the heir-male of Balmaduthy was a minor. All was done that could be done. The heir-male of Benagefield, the father, consented. The nearest heir-male of Balmaduthy, who could consent, signed witness, and the heir-male himself consented as soon as he could.

As to the *third* defence, the maxim, *debitor non presumitur donare*, does not apply; for, in 1754, the marriage-contract 1730 still subsisted, and an heir-male of that marriage might exist, so that it could not be known whether Margaret would ever have right to the 6000 merks. Her claim was uncertain and eventual; the provision of 3000 merks could not be a payment; for payment cannot be presumed when there was no *jus exigendi*: If it was not payment, it was a donation; and, if it was once a donation, no after event could change its nature.

On the 20th November 1766, the Lords found that the pursuer was a creditor for the 6000 merks. But found, that the 3000 merks provided in the marriage contract 1754 must impute in payment thereof.

Act. A. Crosbie. *Alt.* C. Gordon. *Rep.* Kennet.

OPINIONS.

GARDENSTON. The *eldest* is as well entitled as the *only*. The consent of the heir-male was not necessary here. The father might have dispensed with this stipulation. He did what was equivalent, by consenting to the marriage-contract of his daughter. The 3000 merks must be imputed.

PITFOUR. The 3000 merks must impute, notwithstanding the critical argument in the information for the pursuer. A wife may be supposed physically capable of heirs-male of her body, while at the same time there is no probability of such event.

PRESIDENT. The deed most inaccurate. Failing sons of the marriage, it was reasonable to provide one daughter: no example of settling a provision upon an eldest daughter.

KAIMES. Doubts as to the consent of the heir-male. If the first claim is to be interpreted literally, why not the second? (*i. e.*) I presume, if the L.3000 merks are to be held as additional, and not to impute to the part payment of the 6000, because it is not so said unequivocally; why not also, as the heir-male of M'Kenzie of Balmaduthy, did not actually consent before the marriage of the eldest daughter, take from her the 6000 merks which had been provided to her upon *that* and another condition.

1766. November 21. WILLIAM BUCHANAN *against* JOHN CLARK.

RUNRIDGE.

The Act 1695 *found* not to apply where the fields required to be divided amounted to Thirteen Acres.

[*Faculty Collection, IV. 83 ; Dictionary 14,142.*]

THE twenty-shilling lands of Little Udston belong to Buchanan and Clark; 56 acres to Clerk, 55 and some fractions to Buchanan.

The several fields and acres belonging to each lie not contiguous, but intermixed. The infield land consists of about 12 narrow small fields, containing from four to one acre each. Of them seven belonged to Clark, five to Buchanan.

The outfield land consists of two fields, 13 and 29 acres, and of a field of 41 acres. The former two belonged to Clark, the last to Buchanan.

The field of 41 acres, marked G. in the plan, lies between the fields of 29 and 13 acres, marked in the plan V. T.

Clark insisted, in an action before the Sheriff of Lanark, upon 41st Act Par. 1, Car. II, setting forth that he was about to inclose the fields of 29 and 13 acres, and concluding that Buchanan should be at equal charge with him in making a march dyke to park their inheritances.

On the other hand, Buchanan insisted, in an action before the Sheriff, subsuming that the parcels G. V. T. fell within the statute 1695, and concluding to have them divided.

On the 8th November 1765, the Sheriff found that the ground craved to be inclosed by Clark does not fall within the Act made anent runrig, and that Buchanan is liable in the one half of the expenses of properly inclosing the

said ground, and that he ought to concur with Clark in making a proper fence upon the march which divides their respective properties.

Buchanan advocated this cause. On the 19th July 1766, the Lord Hailes, Ordinary, found that the fields marked V. T. G. *i. e.* those of 29, 13, and 41 acres, do not fall under the Act 1695; and therefore repel the reasons of advocacy, and remitted *simpliciter*. On the 2d August 1766, he adhered.

Buchanan reclaimed against the said interlocutor, and answers were put into this petition.

ARGUMENT FOR BUCHANAN :—

Buchanan endeavoured to establish two propositions, 1st, That the ground in question did fall within the Act 1695 concerning runrig. 2dly, Although it did not; neither did it fall within the Act 1661, concerning march-dyke.

As to the *first*, the Act has not determined what is meant by runrig. The Court however has uniformly applied it to fields lying in rundale, rather than runrig. Thus, in the case *Heritors of Inveresk against Milne*, 13th November 1755, a field of six acres was found to fall under the Act, and, in the noted case, *Chalmers against Pew*, fields of two and three acres were found to fall under the Act; although those acres, situated near the city of Edinburgh, were probably of greater value than the largest field in Little Udston.

The reason of this interpretation is obvious. The Act was intended for the improvement of the country by planting and inclosing. The Act therefore merits a liberal interpretation. A literal one, confined to ridges, would not tend to improvement.

Further, it is plain that little Udston was formerly one tenement divided in consequence of the succession of heirs-portioners, or by some sale, either legal or voluntary. The fields in question are the outfield lands of Udston. They are but accessories of the infield land. It must be admitted that the infield may be divided. Therefore the outfield may be divided also.

As to the second point, the rent of the outfield ground is very inconsiderable, and, therefore, it does not fall under the Act 1661. Thus, in the case, *Penman against Douglas and Cochran*, 3d July 1739, it was found that the Act 1661 does not reach to small feuars who had not above five or six acres of ground. The act does not so much respect the extent as the yearly value of the ground. For the first branch of it requires heritors to plant and inclose more or fewer acres, according to the respective rents.

ARGUMENT FOR CLARK :—

As to the first point, before the statutes 23 and 38 Par. 1695, neither commonities nor lands, lying runrig, could be divided, excepting by voluntary agreement. This was attended with inconveniences; and for obviating them those statutes were made. But as the common rights of property were thereby encroached upon, the statutes are not to be extended beyond their plain intentment. It may be doubted whether the division of fields of two or three acres, lying rundale, can be forced by the statute 1695: but it is plain that that statute never meant to force the division of fields which surpass the size of a common inclosure. One of the fields in controversy consists of 41 acres, of itself no inconsiderable farm. The others of 13 and 29 acres, of themselves large inclosures.

The two decisions quoted are not in point. For, there, the ground was so

situate, as to to be incapable of inclosing, or of any other improvement, unless by being divided.

If an action for dividing such fields, as those of 13, 29, and 41 acres be competent, it is impossible to say where the law would stop. Reasons of expediency might be urged for dividing whole farms and whole estates.

On the 21st November 1766, The Lords adhered.

For Buchanan, J. M'Laurin. *Alt.* R. M'Queen.

OPINIONS.

JUSTICE-CLERK. The law of runrig does not extend to such large parcels of ground. *Adjacent* heritors are mentioned: no matter whether the tenement was originally one or several. The judgment as to half-dyke is also right.

COALSTON. The law, with regard to the division of commonties and runrig lands, is of great utility, and to be liberally interpreted. The statute has not described the meaning of runrig. If this means alternate ridges, there never could be a division. Possession is always by alternate shotts or dales: a single ridge is not sufficient for the purposes of agriculture. Dales are small in infield, large in outfield; for the former are always in corn, the latter sometimes in grass: wherever one tenement has been possessed by different proprietor, so that their properties are intermixed, the law takes place.

BARJARG. All this tenement has been held by the same tenure. It was the view of the Legislature to enforce planting and inclosing. It is most convenient for parties that the law be extended to such cases as this.

AFLECK. The statute is not to be confined to rig about, although land is sometimes so laboured. The statute does not mean to divide different portions of arable ground. It means to prevent common or intermixed possession: although different authors, still there might be a necessity of division; although the same authors, no such necessity; but this cause does not fall within the law. The portions are large. The law did not mean to lay every man's ground together. Here the ground may be inclosed as it is, and when ground can be inclosed without division, there is no place for the law.

PITFOUR. Where the one statute ends, the other begins; so that, if I cannot get a division, I may get a march-dyke: but I know no instance of a division of outfield land if not plowed: rundale might go the same way as runrig, being an accessory.

The Act 1695 must be interpreted so as to apply to this case; for rundale commonly depends upon runrig.

KENNET. Most outfield ground is only bad by being badly managed. Here the fields are large enough for inclosing. We cannot force the parties to exchange their property.

COALSTON. A dangerous rule to determine by inclosures; for four or six acres may be a convenient inclosure.

PRESIDENT. My difficulty lyes upon the words of the Act of Parliament. In many cases, the possession is by rig and rig, though I confess with manifest inconveniency. Two or three ridges, or more, may be runrig. Out-

field cannot be possessed in runrig. How can I vary the property? Great estates may have belonged originally to one proprietor; it would be dangerous to inquire what was joined originally if now separated.

Diss. Barjarg, Coalston, Pitfour and Gardenston.

1766. *November 22.* WILLIAM WRIGHT, Tenant in the Leekeropt, and MARY GRAHAM, his Mother-in-law,—*Petitioners.*

ADVOCATION.

Any time before extract, Advocation is competent, though after pronouncing a decree.

[Kaimes's *Select Decisions*, p. 322; *Dictionary*, 375.]

IN an action of fine, assythment, and damages, before one of the Sheriff-substitutes of Perthshire, at the instance of the petitioners against Catherine Taylor, the Sheriff pronounced a judgment in their favour.

Catherine Taylor, without reclaiming, appealed to the Circuit Court, but afterwards dropt her appeal.

She then presented a bill of advocation, which was passed.

At discussing this advocation, the original pursuers objected to its competency, in regard that the judgment of the Sheriff, not having been reclaimed against, had become final.

On the 26th July 1766, the Lord Kennet, Ordinary, repelled the objection that the advocation is not competent, in respect of the answer, that the decret was not extracted when the bill of advocation was presented and past.

On the 13th November 1766, he adhered.

Wright and Grahame put in a reclaiming petition, and pleaded in manner following:—

By the ancient practice of Scotland, advocations were used for the sole purpose of making inferior judges accountable *ob denegatam justitiam*: even the interlocutory sentences could not be brought under review except by appeal. Those appeals proved inconvenient; and, in their place, advocations for correcting interlocutory sentences were admitted. But further than this, practice has not gone. A cause depending before an inferior court may be removed into the Court of Session. A cause concluded, must be brought under review by suspension, reduction, or appeal. Lord Stair says, p. 551, § 534, that the remedy of advocation hath no place after a definitive sentence; and agreeable to this is universal practice. When an inferior judge pronounces a sentence on the merits of the case, of which the party means to complain by advocation, a reclaiming petition is always preferred, for the sole purpose of keeping the action dependant.

The style of the letters of advocation prohibits the Judge to proceed in the cause. This intimates, that the cause is depending. But if he has pronounced judgment, and if no reclaiming petition is offered, he cannot proceed were he

so inclined. If an advocacy, in such cases, were competent, the style of the letters would be inept.

That the decret was not extracted, does not vary the cause. When a sentence is pronounced, and is not reclaimed against, the Judge is *functus officio*. The extract is a copy of that judgment, which it belongs to the clerk to make out whenever the party demands it. This may be done after the lapse of any number of years, without a waking or the interposition of any judge. An advocacy cannot be received after sentence, though before extract, because *sententia definitiva ultimus actus judicis*, and the extract is but the clerk's part; *Lamington* against *Home of Kaimes*, 10th July 1662, observed by Stair.

It was understood, that an advocacy in the circumstances of the present one was established in practice; and therefore,

On the 22d November 1766, the Lords adhered.

For the petitioners, A. Rolland.

1766. November 27. ROBERT DEWAR, Glazier in Edinburgh, *against* PATRICK MILLER and GIBSON (or Gibbon) and BALFOUR, in Company, all Merchants in Edinburgh.

SOCIETY.

The acting partner of a company, by a bill under the firm of the company, for money borrowed, binds the company.

[*Faculty Collection*, IV. 63; *Dictionary*, 14,569.]

1st July 1763, Messrs Miller, Gibson, and Balfour, together with John Weir, entered into a contract of copartnery for carrying on the linen trade. By the contract it was provided, that the trade should be managed by John Weir, in name, and by the firm of John Weir and Company, for which he was to have a salary of £80 *per annum*, besides the expense of clerks: that the capital stock should be £2400, one-half to be advanced by Weir, one-fourth by Miller, and one-fourth by Gibson and Balfour: that any further sums necessary for carrying on the trade, should be advanced by the partners according to the proportions aforesaid: that a regular book should be kept, and be patent on all occasions for the inspection of the partners: that John Weir should not be concerned in any other business, with any person whatever, without the consent of all the partners, nor make any sale or purchase exceeding £100 sterling, without the consent of one of the partners; that he should not borrow any money under their firm, without the previous consent of all the parties, under the penalty of half of the money so borrowed.

It was also provided, "That, whatever other rules and regulations, or alterations of the articles, shall be by the partners judged useful and necessary for the better carrying on the affairs of the company, and shall be inserted in the journal, and signed by them, or which shall be agreed to by any other writing under

their hands, shall be equally binding as if herein engrossed." This contract was not registered.

The trade was carried on by Weir in the name of John Weir and Company ; and it appeared, upon inquiry, that Weir accepted many bills, under the firm, which, *ex facie*, had no relation to the linen more than to any other trade, and that they were discounted by the banks at Edinburgh, and by the British Linen Company. In fact, however, all those bills were on account of the linen trade, excepting one bill, which gave rise to the present question.

It also appeared that P. Miller used to advance money to Weir on account of the company.

On the 14th December 1764, Robert Dewar put L.160 sterling into the hands of Weir, and took his accepted bill for the value payable six months after date. The acceptance was under the firm of John Weir and Company.

Before this bill fell due, Weir proved bankrupt. Messrs. Miller, Gibson, and Balfour, made intimation to the two banks, and to the British Linen Company, that they were not to be thereafter liable in payment of bills accepted by Weir, under the firm of John Weir and Company.

The bill having become due, Dewar was about to charge the partners. They offered suspension, and their general defence was, that Weir, by using the firm of the company, could not bind them in a bill for borrowed money.

ARGUMENT FOR THE CHARGER :—

1st, As the contract was not registered, the charger was not bound to know, and neither did nor could know, any of those particulars on which the defence is founded.

2dly, Borrowing of money is an ordinary act of administration in companies. The charger could have no reason to suspect that John Weir and Company might not borrow money on account of the partners, as well as every other company in Edinburgh borrows money on account of the partners. This borrowing is particularly necessary in the linen-trade, as appears by the bills which the banks in Edinburgh and the British Linen Company accepted or discounted for Weir and Company.

3dly, This is further evident from the intimation made to the banks and to the British Linen Company, by the other partners, after Weir proved insolvent.

4thly, It was not upon the faith of Weir, but upon the faith of the company, whereof Weir was the acting partner, that the charger contracted. He had no acquaintance with Weir : he knew nothing of his character or credit, but he saw him to be acting partner in a company whereof the other partners were persons every way unexceptionable : he saw that bills, accepted by Weir under the firm of the company, had full credit and free course ; and he considered the circumstance of Weir's being associated in such a company, as evidence that he was an honest man, and his being intrusted with the firm of the company, as evidence that his acceptance was good.

5thly, If gentlemen will associate themselves in companies, without inquiring into the integrity of the acting partner, and if they intrust such an untried person with their firm, they have themselves to blame for the consequences. If, on the other hand, they associate themselves in companies, which imply a power of becoming bound in name of the company, and then, in the event of a fraud or bankruptcy of the acting partner, seek to throw the loss on those who

contracted with the company, there is an end put at once to all credit in Scotland. Where stocks are small and business complicated, companies are necessary; such is the case in Scotland. But, if it is to be understood that one partner may, whenever occasion offers, throw the load of paying debts off himself, and lay it upon another, then a merchant engaged in a copartnery trade must cease to find credit in the mercantile world.

If the suspenders have unwarily associated themselves with a false man,—if they have suffered him to act in their names,—if they have taken no measures to inspect and control his management, who is it that ought to suffer?—the charger who trusted to the firm of Weir and Company, or the suspenders who trusted Weir?

6thly, The clause in the contract, which provides that Weir should not borrow money under the firm of the company without the previous consent of all the partners, under the penalty of half the money borrowed, does of itself afford a strong argument in support of the charger's plea.

From this clause it appears that the partners had the borrowing of money in view, a necessary measure in the linen-trade, where the capital was only L.2400, burdened with L.80 to Weir, besides salaries to clerks.

From this clause, it further appears that the partners imagined that Weir, by borrowing money under their firm, would have bound them; that Weir was authorised to borrow any sum of money under their firm, in case he previously obtained their consent: and there is here no irritancy provided against the creditor who should lend money even without such consent.

7thly, By the 11th article of the contract, it is agreed, "That whatsoever other rules and regulations, or alterations of the articles before mentioned, shall be by the partners judged useful and necessary for the better carrying on and managing the affairs of the company, and shall be inserted in their journal and signed by them, or which shall be agreed to by any other writing under their hands, the same shall be equally binding as if they were here ingrossed and insert; and to the faithful performance of which all the said partners are hereby expressly bound." Now, supposing that the contract had been registered, and made patent to the petitioner and the whole world, how could any one, purposing to deal with Weir and Company, be instructed in the proper and safe method of regulating his conduct? All the articles, appearing *ex facie* of the contract, might have been altered, either by an agreement entered into the journal of that company, or by any other writings which could not be registered; and all such alterations are held as ingrossed in the contract.

ARGUMENT FOR THE SUSPENDERS:—

The suspenders were not engaged in a general copartnery with Weir, but only in an adventure of the linen-trade. The nature of this contract was ascertained by the articles above mentioned. As the partners agreed to pay each of them a particular sum, it is obvious that they did not mean to intrust Weir with the borrowing of money: whenever they borrowed money it was upon their own security.

The contract of copartnery did expressly prohibit Weir from borrowing money without consent of the partners; so that the charger cannot plead that he lent money to Weir upon the faith of the contract.

The circumstance of Weir having added, *and company*, to his acceptance, is

not sufficient to subject the suspenders in payment. It is true that Weir accepted many bills under the firm of Weir and Company, and that the suspenders discounted them. But all those bills related to the copartnery trade of linen.

Although Weir could bind the company in matters relating to that trade, he could not bind them at large. His power extended no farther than to acts of ordinary administration. The borrowing money is not such; whenever the partners borrowed money they all joined in the security.

To the particular arguments for the charger, the following answers occur :

As to the first argument, there is no register provided in law for registration of copartnery contracts. The charger had the same security that every one has who deals with persons in copartnery. Had he sold his goods, the firm of the company would have been his security : but, when he lent money, he ought to have taken the company bound.

As to the second argument, it proceeds upon a mistake, by confounding, under the general name of companies, all copartneries, however different in their nature and manner of dealing. Banking companies borrow money for a short space, for such borrowing is part of their trade. Companies in a branch of manufacture do not; for such borrowing is no part of their trade : they borrow upon permanent security; and, accordingly, though the suspenders have borrowed money upon permanent security, yet they never accepted bills under the firm of the company, unless for the price of goods.

As to the third argument, the intimation to the banks was necessary, because the suspenders were bound with respect to bills accepted by Weir and Company for the price of goods.

The fourth argument is affected; for the charger could not know that the suspenders were partners under the firm of Weir and Company. It is plain that he trusted solely to the credit and veracity of Weir.

The fifth argument, from inconveniences, tends the other way; for, if the acting partner can, by borrowing money, bind his associates to any extent, the fortune of the richest merchants will be at the mercy of every mean mechanic. With them they may have a copartnery concern. Such mechanics must, in the nature of the thing, be the acting partners.

As to the sixth argument, the suspenders will be very unhappy, if a clause, which they inserted, in order to prevent Weir from borrowing money, should have the effect of making them liable for his private debts.

The purpose of the clause was to prevent Weir from borrowing money imprudently, and laying it out on the Company's account. It could not be meant to prevent Weir from borrowing money on his own account. The obligation on Weir, to contribute L.1200, was nominal as often happens in such contracts.

As to argument seventh, the power of making alterations is common in all contracts of this kind, and can only regulate the obligations among the partners.

On the 22d January 1766, the Lord Kaimes, Ordinary,—having considered the contract of copartnery by which no power was given to Weir, the managing partner, to borrow money, but only to buy and sell; and having also considered the condescendence of the bills accepted by Weir, under the firm of

the Company, which bills appear all to be for goods purchased by Weir for the company,—finds that the defenders are not liable for payment of the bill in question.

The charger preferred a reclaiming petition, to which answers were put in by the suspenders.

On the 14th July 1766, the Lords repelled the reasons of suspension, found the letters orderly proceeded, and decerned.

On advising a reclaiming petition and answers, the Lords ordained memorials, more with a view to the general point than to this particular cause.

On the 27th November 1766, the Lords adhered.

Act. R. Blair. A. Lockhart. *Alt.* A. Wight.

OPINIONS.

PITFOUR. It is said you ought to have published your copartnery. Answer, No. If you trust John Weir, you must inquire in what manner I trusted him. When a trade is carried on by a Banking Company, the firm of the Company will bind, because the nature of the money dealings of such company is unlimited. But here there is no evidence of such power either from practice or from the tenor of the contract.

N.B. At second hearing of the cause he said: I formerly thought the Ordinary's interlocutor was right, because it was reasonable for the company to limit a partner. But the thing which now satisfies me to alter the Ordinary's interlocutor, is this, that Weir used to grant bills under the firm of the company, and that the company discounted these bills. Thirty years ago a poor gentleman, Duff of Cubin, was ruined by M'Kay of Scourie's drawing bills under the firm of the company. There is no help for this when one partner trusts another.

PRESIDENT. I am not yet satisfied that the articles of the copartnery are favourable to the plea of the suspenders. I would have done the same thing that Dewar did—there is a clause in the contract giving a power to borrow under a penalty.

GARDENSTON. Adding of a penalty will not give a power to borrow: an acting partner has no power but according to the articles of the copartnery. I cannot see a ground of differing on the general point. Unless the partner is authorised to borrow money, his bond will not be effectual. But here the question is as to practice. Weir was not in the use of borrowing money or granting documents which the mercantile world could understand as borrowing money. His bills would be considered as implying purchases of goods.

KAIMES. The sense of the clause mentioned by the President is,—“You are prohibited to borrow. If you do, you are liable in a penalty.” No man can be bound without his consent. If one man has lent money, and the company discounted, I will consent as to borrowing; but my difficulty is this, that here is the only bill for borrowed money. It does not affect me that creditors may be ensnared, for they have themselves to blame. The charger, here, had ready access to know whether the company borrowed money.

KENNET. For adhering to the Ordinary's interlocutor. Weir was not authorised to contract debts, but on the contrary. But, upon the second hear-

ing for altering that interlocutor, upon the *species facti*, not upon the general point. The bills accepted by Weir, and discounted by the company, did not bear for value in goods.

BARJARG. The world can have no rule to walk by but that of the practice of the company.

AUCHINLECK. The general point is not the thing at all. One man cannot bind another in company without a commission; but here there is a company which has been in use to allow Weir to take up money by granting bills, and those bills paid without objection. No recourse need be had to a general point where there is a declaration so express of the company's purpose. If a servant has been in use to purchase, upon credit, necessaries for his master, and the master has been in use to pay, may the master stop short and refuse to pay? The company must pay this debt, as they have brought it upon themselves, by granting Weir such credit; otherwise Dewar would lose his money upon the faith of the company.

COALSTON. If the interlocutor of the Ordinary be adhered to, an end is put to trade: consent may be given either by implication or expressly. I shall admit that there are no express powers, but there are clearly implied powers. Had the whole bills been for the *price of goods*, there might have been some difficulty; but most of the bills bear for *value received*, and so the company led the world to believe that Weir had power to borrow money. No man is bound to look into contracts of copartnery or the books of partners. Besides, the contract bears only, that their books are to be patent to the partners. I am also clear upon the special circumstances of the case: Mr Patrick Miller himself advanced money to Weir upon the firm of the company. The contract, then, was deviated from. Weir was bound, by the contract, not to make purchases for more than L.100; yet the bills produced show that this also was deviated from: much larger sums have been paid for goods.

At the first hearing: *Diss.*—Kaimes, Pitfour, Gardenston, Kennet. *Non liquet*,—Auchinleck. *Not present.*—Barjarg, Alemore, Coalston, Milton.

At the second hearing: *Diss.*—Kaimes, Gardenston. Justice-Clerk did not vote on account of relationship.

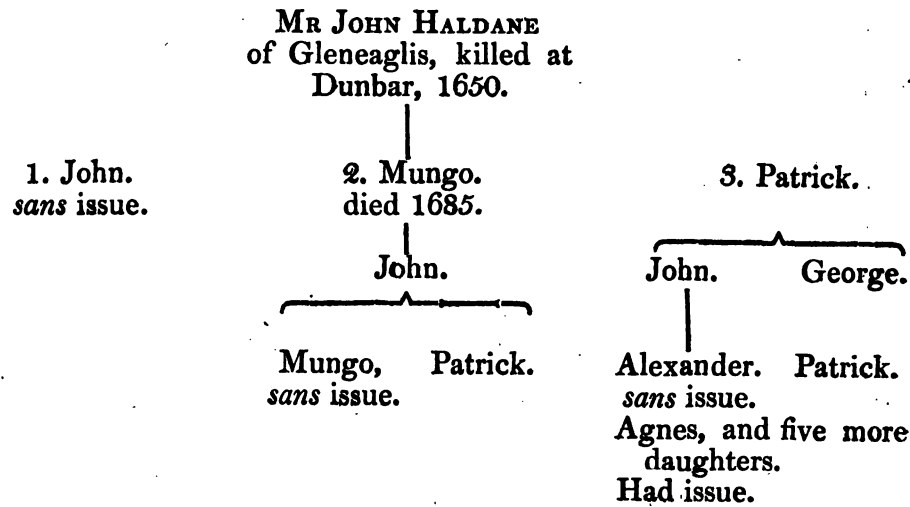
1766. November 27. MR PATRICK HALDANE, Advocate, against ANN HALDANE, and the other Five Daughters of Haldane of Lanark.

SERVICE OF HEIRS.

Effect of a General Service, *tanquam legitimus et propinquior hæres* to a father.

[*Faculty Collection*, IV. p. 379; *Dict.* 14,443.]

For understanding the question between the parties, the following genealogical tree is necessary:—



About the year 1450, John Haldane of Gleneaglis acquired the estate of Lanark, by his marriage with the eldest daughter of Monteath of Ruskie. In 1508, the estate of Lanark was united with the barony of Haldane. In 1650, Sir John Haldane of Haldane and Gleneaglis was killed at the battle of Dunbar, fighting in the cause of Charles the Second. He left three sons, John by his first marriage,—Mungo and Patrick by his second marriage with the widow of Sir Robert Arbuthnot of Arbuthnot. John died without issue. The pursuer is heir-male and of line of Mungo. The defenders are heirs of line of Patrick. This appears from the genealogy prefixed. There were various debts and diligences affecting the estate of Gleneaglis, comprehending Lanark. More particularly, Patrick, the third son of Sir John Haldane, had right to the following debts, in manner following:—On the 31st December 1655, he obtained an heritable bond for 3000 merks from his elder brother John. In virtue of this, he was infeft in a part of Lanark. On the 5th March 1678, he acquired right to a decret for 12,000 merks, as the single avail of the marriage of John Haldane of Gleneaglis, to which Sir William Purves had a gift. Having deduced an adjudication against John, of the lands of Lanark and others, lying within the barony of Haldane, for the said sum,—past a charter and taken infeftment,—he was, on the 12th August 1668, preferred to the mails and duties of these lands. On the 18th February 1671, he acquired right to an apprising of Haldane and Gleneaglis, comprehending Lanark, deduced in 1654, for 9560 merks, and to a gift of recognition of Lanark, dated in 1670. On the 12th and 19th July 1672, he acquired right to a like apprising deduced in 1654, for 8376½ merks, on which charter and seasine had followed. Thus, besides the gift of recognition, Patrick had right, in 1672, to the following capital sums affecting the family estate, wherein Lanark was comprehended:—

1693, John, the son of Patrick, was, by the direction of his tutor, John, the son of Mungo, served nearest and lawful heir to his father. Before John made up titles to the estate, he acquired certain incumbrances affecting it; particularly, 1st January 1711, a disposition, to himself and his heirs and assignees, of the lands of Saughans, which had been wadsetted in 1654 for 1500 merks: 3d and 7th December 1719, a like right to the half of the lands of Cassivoir and Druniverig, which had been feued by his grandfather in 1627. On the 26th July 1726, he obtained a charter from the crown in favour of himself, and the heirs-male of his body, and assignees whatsoever, &c. in terms of the contract 1675. On the 27th October 1726, he was infeft. After his titles were completed, he acquired the following rights:—3d January 1740, the parsonage lands of Ruskie and Lanark; 22d November 1729, Miln and Milnlands of Lanark; 23d February 1764, vicarage teinds of certain parts of the estate of Lanark. He took the dispositions to all those parcels, either to himself and his heirs, or to himself and his assignees.

John Haldane, and his eldest son, Alexander, engaged in the rebellion 1745. They were both excepted out of the act of indemnity, and *billa vera* was found against both. On the 3d December 1746, John executed a deed, whereby, upon the narrative of love and favour, he disposed the estate of Lanark to his second son, Patrick. This disposition bears an assignation to the writs, after the granter's death; and it is thereby declared, that he had delivered the whole writings of the estate to a trustee, and he dispensed with the delivery to Patrick himself. In 1750, John, and his son Alexander, against whom *billa vera* had been found, went to France, and afterwards returned to Scotland. On the 4th December 1757, Patrick executed a disposition in favour of his six sisters, equally amongst them, and their heirs and assignees, equally among them; reserving his own and his father's liferent, and a power to alter. In 1761, Patrick died. In 1763, Alexander died. In 1765, John died. In 1765, Mr Patrick Haldane was served heir-male and of provision in general to Patrick Haldane of Lanark, his grand-uncle, that he might thereby establish in himself a right to the procuratory in the contract 1675. It was agreed that all objections, at the instance of John's daughters, should be reserved. Mr Haldane, having thus made up his titles, insisted in a reduction of the disposition granted by John to his son Patrick, and by Patrick to his sisters. The sisters, in their turn, insisted in a reduction of Mr Haldane's rights. The processes were conjoined.

On the 17th December 1765, The Lord Auchinleck, Ordinary, pronounced the following interlocutor:—"Finds, that, by the contract 1675, Patrick Haldane, and his heirs, had the absolute and unlimited right to the estate of Lanark, and were at full liberty to alter the order of succession, and dispose the estate to whom they pleased; and that, in respect the estate is, by that contract, confessed by his brother Mungo, the other party contractor, to have been antecedently the property of Patrick, and to have stood only in his, Mungo's, person, as a trust for behoof of Patrick, and there is no restriction from altering the order of succession in the deed,—that it has no relation to a settlement made by Mungo, so is not of the nature of a mutual tailie; and, in respect the clause of return to Mungo, and the heirs-male of his body, is only failing Patrick, and the heirs-male of his body, and assignees whatsoever, finds, that, as Patrick did not expedite a seasine on the precept contained in the said contract, John Hal-

dane, his son, upon the father's death, made up a proper and legal title to the personal right, which was in his father, by obtaining himself served and retoured heir in general to his deceased father; whereby he is cognosced *legitimus et propinquior hæres dict. Patricii Haldane, ejus patris*, which ascertained upon record not only his universal right, but also that he was heir-male of the body of Patrick, and superseded the necessity of a service as heir-male: And finds the disposition by John Haldane to his second son Patrick, his heirs and assignees whatsoever, bearing delivery to a trustee, and dispensing with the not delivery to Patrick himself, habilely conveyed the estate to the said Patrick, and his heirs general, which must now be taken up by the heirs general of Patrick, or by his assignees. And as the six defenders against Mr Patrick Haldane's reduction, who are the daughters of John, and sisters of Patrick, are both heirs to Patrick their brother, and have a disposition from him, assoilyies them from the reduction brought against them by Mr Patrick Haldane; and finds he has no right to the lands and estate of Lanark, and others, described in the summons and in the title-deeds of that estate; but that the same belongs to the said six heirs and disponees of the deceased Patrick; and decerns and declares accordingly.

PITFOUR. Before the year 1738, this difficulty did not occur; it then occurred in the case of *Eshieshiels*. A service of heir-male to his father did not carry a right as heir-male of a marriage; for the one title did not necessarily imply the other: but here *legitimus et propinquior hæres patri*, implies heir-male, though it does not necessarily imply heir-male and of line: Thus, suppose a man to have two sons, the eldest dies, leaving a daughter; the daughter will be the heir of line, the second son will be heir-male. In the case of *Sir Robert Hay of Limplum*, it was found that a general service might imply of provision, though there was no reference to the provision.

PRESIDENT. Here no mistake could be: *constabat* what the person served was. Dangerous to overturn investitures upon specialties.

The Lords adhered without a vote.

For Mr Haldane, H. Dundas. *Alt.* D. Græme.

1766. December 2. ARCHIBALD STEWART *against* THOMAS FOGGO and WILLIAM GALLOWAY.

LEGAL DILIGENCE.

Poinding by an indorser, in name of an indorsee, knowing him to be dead, is null, and not even capable to afford retention.

[*Faculty Collection, IV. p. 277; Dictionary, 8136.*]

PITFOUR. Poinding is null, as executed in name of a dead person. Retention is not a good plea. Compensation, and even retention, may be good

against an arrester ; but, if the subject be wrongfully apprehended, I do not see how retention can be good. This would take away all difference between regular and irregular diligence.

PRESIDENT. This case may be differenced from that of Magbiehill, but I do not like that decision. Arniston's opinion, as stated upon that case, in the collection of remarkable decisions, is different from what I understood to be his opinion.

AUCHINLECK. A man in the East Indies sends home a bill, diligence is done upon it, money is recovered ;—it afterwards appears that he was dead when the diligence was used :—What will be the consequence ? Again, at a poinding, it may be objected, that the creditor is in the East Indies, and is dead, yet no remedy in this case,—the diligence is null.

KAIMES. Here there are no *termini habiles* for retention ; the money is in the hands of Oliver and Scott.

COALSTON. This case may be attended with very important consequences. Diligence may very innocently go on in the name of a dead man ; yet it is hard to get over the interlocutor. When I come to the possession of my debtor's effects, in a lawful manner, I may retain. In the case of *Yeates*, where goods, without authority, were put into the hands of a creditor, he was allowed to retain ; but here the diligence itself was unlawful, and hence the possession was unlawful.

The Lords adhered to Lord Gardenston's interlocutor.

Act. R. Sinclair. Alt. D. Armstrong.

1766. December 2. WILLIAM MACKECHNIE against WILLIAM WALLACE.

FOREIGN.

Action for the Penalties of Usury in Scotland is not limited by Act 31st Elizabeth.

[*Fac. Coll. No. 275 ; Dictionary, 11,144.*]

STONEFIELD. Action is competent before the inferior court, and the procurator-fiscal is the proper pursuer. The statute of limitations does not extend to Scotland.

ALEMORE. The penalties may be sued for in any court—before the justices of peace. Of penalties inflicted, half goes to the Crown. As to the question itself, the decisions are directly opposite.

PITFOUR. Laws made in England, before the Union, have no authority in Scotland ; but all of us must be of opinion, that laws made since the Union have authority. The question then, is, whether must the limitation in the statute of Queen Elizabeth be implied in the statute 12mo Annæ ? I cannot doubt that it is implied : it certainly is as to England. I would have required an express declaration of the legislature for proving to me that they meant to put the subjects of Scotland in a worse situation than those of England. A

PRESIDENT. As to competency—*pursued in the county* means that a jury be brought from the county. A defence, upon an English statute, may be founded on in an action on a contract in England, but not when the prosecution is in Scotland, upon a Scots offence. The statute of limitation is good as to English people or English contracts, but not as to Scots. The case of the *Booksellers* had something of legal favour, but there was also a difference between it and the present case. There the trial was upon a statute carried into execution in England, by an entry at Stationer's Hall. If the offence was thus charged upon an English statute, it was right to give a defence upon the same law. This, however, is but a subtlety. There are difficulties on either side: I must however find this case to be within the statute or not. When the statute of Elizabeth was enacted, it was merely an English statute. The method of trial in the Act 12mo Annæ is by the law of England, and so execution passes. In trying the crime in Scotland the defence pleadable in England is not pleadable, because the offence is local. In the case of the *Duke of Douglas* against *Lockhart of Lee*, it was laid down as law in the House of Peers that the statute there founded on was to be explained according to the law of Scotland. If a statute is grievous, the legislature must correct it.

The Lords repelled the defences of incompetency and of prescription.

Act. D. Dalrymple. Alt. J. M'Claurin. A. Lockhart. Rep. Justice-Clerk.

Diss. as to prescription, Kaimes, Pitfour, Strichen, Justice-Clerk.

1776. December 5. PATRICK LEITH, *Suspender*, against The FACTOR ON LEITH-HALL, *Charger*, CAPTAIN JAMES STUART.

TACK.

Tenant's Oath in a judicial rental cannot supply the want of a written tack, so as to support his possession under a verbal lease for nineteen years.

[*Dictionary*, 15,178.]

COALSTON. The dislike I have at an heir's pleading upon a *locus pœnitentiæ* may mislead me in my judgment. The charger agrees that there was a verbal bargain for 19 years, and that this bargain was minuted,—why put the minute into the hands of Wardhouse if it was not signed? Besides, here there was *rei interventus*. The law gives *locus pœnitentiæ* when the bargain is *nudis finibus contractus*; not where there is *rei interventus*,—the case mentioned by Spotiswoode and Auchinleck in 1629. According to the charger's argument, a tenant may be suffered to possess in years of famine, and may be removed as soon as the rent may be easily obtained upon a profitable possession.

JUSTICE-CLERK. Here there is no evidence of a written agreement. If there had been a rental sworn to upon a *lis contestata*, it would have been a judicial

rental ; but here there is not a judicial rental, only an inquiry into the rent. If we sustain this, we set tacks of the gentleman's whole estate. The rental ascertains nothing more but a verbal agreement :—this the heirs may safely admit.

ALEMORE. The rental, joined with the other evidence, is sufficient to secure the tenant. A judicial compromise is binding.

AUCHINLECK. Here there have been communings and a jotting, but no tack or minute ; for, if that had been the case, the witnesses would have subscribed. The only difficulty is as to the second point ; of the rental. If one refers the rent and the title to possess to the oath of the tenant, this is sufficient. The referring the rental to the oaths of the tenant must have been in order to bind them down to that rental. The tenants could not afterwards have denied the tack or its terms, for the answer by the master would have been *juratum est*. If the tenant was bound, how could the master be free?

BARJARG. The oath emitted in Leith-hall's presence is not sufficient ; for it does not mention a written agreement.

KENNET. The interlocutor, allowing a diligence for proving, related singly to havers, so that the proof taken by witnesses was irregular.

GARDENSTON. Leith-hall verifies and approbates what the tenant says, by his conduct during the whole of his life ; and, in terms of the supposed agreement, he orders a tack to be made out.

KAIMES. There is no evidence that the minute was signed by the parties in order to be obligatory : but the judicial rental was taken in presence of Leith-hall, was received by him, and according to it rent was paid. A verbal agreement about a sale of lands does not produce action about a tack, only for the possession of one year : but, if a man is put into possession and pays rent &c., a personal objection lies against the landlord, because it is unjust in him to except. The landlord's acquiescence proves that the oath was true. Writing is necessary to make a tack, that is to say, to make it good against a purchaser. Were the tenant insisting for performance, the verbal agreement would go no further than for a year ; but, here, how can the master go against his own deed ? The verbal contract cannot be proved by witnesses, but here the agreement is proved by the rental. A personal exception would have lain against Leith-hall, and consequently lies against his representatives.

PITFOUR. Here is presumptive evidence of a writing, but this will not prove the tenor ; because, in an action for proving the tenor, the writing must be proved formal. There is, however, here a *rei interventus*, and an approbation on the part of the master. Were Leith-hall alive, he would be precluded from the action *exceptione doli*. In the case of *Baron against Duncan, 6th March 1752*, an informal writing was found homologated ; but then there is a difference here that there is no writing. There is, however, an oath put to the tenant by the master, and this judicial document may be taken as an informal writing.

PRESIDENT. The law of Scotland inclines for writing : a verbal agreement for a tack is not good beyond a year. The tenant contracting may insist for a tack with the legal solemnities—otherwise confusion would be introduced. The decision 1629 has been overruled. If the tenant possesses in dear years

without a tack, it is his own fault. The case of *Baron* was upon other principles: *there*, there was writing,—informal but homologated; *here*, there is no evidence of writing,—no proof of *rei interventus*. The master is not bound by the judicial rental,—the whole resolves into a verbal agreement, and there is still *locus pœnitentiæ*.

On the 5th August 1766, the Lords sustained the reasons of suspension. On the 25th November 1766, they found the letters orderly proceeded. On the 5th December 1766, they refused a petition from the tenant and adhered [to Lord Kennet's interlocutor,] but remitted to the Ordinary to hear parties, as to the claim of meliorations made by the tenant.

For the Charger, C. Gordon. *Alt.* R. Blair.

1766. December 17. GEORGE BAILLIE *against* MRS JEAN ROSS.

PROCESS,—FORTHCOMING.

A Decreet of forthcoming was reduced, because the circumduction of the term against the arrestee proceeded on an Act and Commission, in which the blanks were not filled up, and was obtained when the process was asleep.

[*Faculty Collection*, IV. 85 ; *Dictionary*, 12,210.]

JUSTICE-CLERK. If this were to be held a decret *in foro*, no man, however rich, could be sure of leaving a sixpence to his family.

COALSTON. This is a decret *in foro*, because a lawyer appeared, and his gown is his warrant. Lawyers and agents ought to be cautious how they appear: but here two plain nullities appear in the decret. 1st, The commissioner left blank, and no judge-ordinary substituted. 2d, Circumduction taken when the process was sleeping. The Act of Parliament occasioned by the surcease of justice has no place here.

AUCHINLECK. We have good nullities, and therefore I am for sustaining them.

PRESIDENT. This is a catch altogether. A single appearance of a lawyer taking a day without making a defence, certainly does not imply a decret *in foro*.

The Lords sustained the reasons of reduction and defences, found expenses due, and modified them to L.12 : 12s.

1766. December 9. JOHN PAXTON against GEORGE MORE.

PROMISSORY NOTE.

Arrester on a Debt of the original Creditor was preferred to the Indorsee.

[*Faculty Collection*, IV. 278 ; *Dictionary*, 12,259.]

JUSTICE-CLERK. Promissory notes have as extensive a course as bills ; are indorsed daily, and are understood, in the practice of merchants, though not in law, to be valid : but still they have not the same privileges as bills.

AUCHINLECK. Bills are good for nothing if they debord from their proper nature. How then can a promissory-note have the privileges of a bond ? A promissory-note is indorsable, but such indorsation has no privileges. The arrestment is good.

PITFOUR. In England, promissory-notes have, by statute, the same privileges as bills ; this might be expedient in Scotland, but it is not the law of Scotland. Our decisions are uniform as to this matter of notes. It was doubted, of old, whether promissory-notes were probative : at last it was found that they were probative. The next question, whether indorsable ?—As probative, they may be indorsed ; other deeds *in re mercatoria* are indorsable, as debentures, —31st January 1724, mentioned by Edgar, 22d January 1750, *Alison* against *Seton*. Another question, whether indorsable blank ? Here a difficulty from the Act 1696. That Act cannot extend to promissory notes or debentures ; yet, in custom, such blank indorsements are allowed. An indorsement may be filled up *a quocunque* without check ; but still the other extraordinary privileges of bills are not to be extended to promissory-notes. He who takes indorsements must beware, for he has no negotiation. The decision, *Clarkson*, in 1757, is just. After an assignation, you cannot prove by the oath of the assigner.

The Lords preferred Paxton, the arrester,—adhering in effect to Lord El-liock's interlocutor.

Act. H. Dundas. Alt. J. M'Claurin.

1767. January 20. JAMES DEWAR of Vogrie, against MR WILLIAM FRAZER, Writer to the Signet.

PROPERTY.

A proprietor may build a Drawkiln for burning lime on any part of his property, although thereby a conterminous heritor's property should be hurt.

[*Faculty Collection*, IV. p. 88 ; *Kaimes's Select Decisions*, p. 323 ; *Dict.* 12,803.]

COALSTON. A proprietor may use his property as he pleases, unless it be

in æmulationem vicini: this work is not *in æmulationem vicini*. The power of removing nuisances ought to be tenderly used. If a house is built just close to another, this may be a great nuisance, but there is no remedy.

KAIMES. In exercising your own property, you must not destroy your neighbour's, *immittendo in alienum*, though you may debar him from benefit: the first is the case here: I would desire to know, whether any other place might not serve for a drawkiln.

PRESIDENT. Any thing that is a nuisance, cannot be erected to the hurt of a neighbour, if the nuisance is such in its own nature, or occasioned by what is not a proper use of the subject.

Mr Frazer ought to have considered this inconveniency before he purchased the house. Lord Abercorn's fire-engine is not a nuisance, lying off the road.

PITFOUR. It is improper to exert an arbitrary power in limiting the use of property. The nature of property is such, that it may be used in any manner for a man's advantage, if not *in æmulationem*. But there is an exception founded in the nature of property; as I cannot encroach upon you, so cannot you upon me, by sending noxious messengers. Can it be said that I do not meddle with my neighbour's property, when I send in a smoke and vapour upon him? The case in the Roman law of *taberna casearia* is very similar.

HAILES. This is a public nuisance,—a limekiln situated just upon the highway: every man that travels that road may be affected by it: it is not only poison, but dangerous, as nothing is apter than smoke to terrify horses; every man, therefore, who is concerned in the road, seems to have a right to sue for removing the nuisance. The case of the brick-kilns near the Queen's Palace is not to the purpose; for it is probable that those kilns are more ancient than the Palace, so that the error was in building the Palace too near them. Lord Mansfield's judgment upon nuisances seems equitable, and to the point.

JUSTICE-CLERK. By diverting water into another man's ground, I use his property: It is carrying the analogy very far, when we apply it to the immision of smoke;—every manufactory would send out smoke in a certain degree. It is owing to the common course of nature, that smoke goes over the neighbouring ground.

BARJARG. No man is to be restrained from the use of his property, unless he exercises it *in æmulationem*. This *æmulatio* appears when the thing may be done equally well in a place where the neighbour would receive no hurt.

AUCHINLECK. If the principle *non licet immittere in alienum* is to relate to air, which is common to every body, there can be no drawkiln in Scotland, and every sort of work occasioning smoke may be stopt.

The Lords allowed the work to proceed, and adhered to Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Dalrymple.

Diss. Kaimes, Pitfour, Kennet, Hailes.

1767. January 23. ALEXANDER MUDIE, *against* JOHN, &c. AUCHTERLONYS.

PROOF.

A Mandatar being dead, evidence by witnesses was admitted to prove, from his acknowledgment, and from other circumstances, that he had authorised, verbally, the purchase of an heritable subject.

[*Faculty Collection, IV. p. 60 ; Dictionary, 12,403.*]

PITFOUR. It is a rule in law, that mandate cannot be proved by witnesses ; but that rule is not to be restricted, as not to allow a proof of circumstances by witnesses. The Act 1696 does not allow trusts to be proved except *scripto vel juramento* ; for trusts may be the means of carrying away a whole estate, whereas mandate can only infer damage. This case is not within the act 1696, but within the prohibitive rule of law, which does not exclude the proof of circumstances. I doubt, however, as to finding the defenders liable in expenses ; upon the rule of the civil law, *actio rei persecutoria ex delicto non transit in hæredes*.

KAIMES. This is in consequence of the heir being universally liable, but different when the heir is *lucratus* ; he must make up the loss occasioned by his father's denial of the trust, in so far as he gains by the succession. The case of *Orbiston* was different ; for, there, no action was brought against the father in his own lifetime.

The Lords sustained process,—found the sale binding,—and the heirs of Auchterlony liable for the price, with interest from the time of the sale, and also found expenses due.

1767. February 26. JANET GIB and her Husband, *against* ALEXANDER LIVINGSTON.

PROOF.

Parole evidence is competent to prove, that an heritable bond, bearing to be onerous, and adjudged by an onerous creditor, was granted gratuitously, and contrary to the Act 1621.

[*Faculty Collection, IV. p. 78 ; Dictionary, 909.*]

COALSTON. This pursuer is in the same situation with every other onerous creditor. I doubt how far the bond could be disproved by witnesses, but, at any rate, inhabile witnesses ought not to be received.

AUCHINLECK. It is not sufficient to say, as a reason for examining inhabile witnesses, that there was a difficulty in finding habile witnesses.

PITFOUR. Ought not the unexceptionable witnesses to be first examined, and then we may see whether there is a *sempilena probatio*, and whether the proof may not be completed by witnesses more inhabile.

PRESIDENT. Of Pitfour's opinion.

KAIMES. The nature of this process is as to an alleged fraud; and yet it is said, in the condescendence, that Gib, the author of the fraud, signed the deed reluctantly: When such is the supposed *species facti*, we ought to be careful how we admit inhabile witnesses.

The Lords refused, *hoc statu*, to admit the aunts and uncles as witnesses.

Act. W. Nairne. Alt. D. Rae. Reporter, Barjarg.

1767. February 27. MARGARET, Countess-Dowager of Caithness, against The EARL of FIFE and SIR JOHN SINCLAIR.

ALIMENT.

The widow of an Earl is entitled to Aliment till the term of payment of her jointure, to mournings, and to a sum of money in lieu of a jointure-house, though she had received a separate aliment in her husband's lifetime, which reached to that term, and though a jointure-house on the estate was offered her.

[*Faculty Collection*, IV. p. 101; *Dictionary*, 481.]

BARJARG. Executor is liable for the interim aliment, and for mourning. The heir is liable for the house.

PRESIDENT. Quoted the case of *Gordon* in 1763, where the conventional aliment was found not to be the rule, but L.8 was raised to L.15.

COALSTON. As to the interim aliment, we are not tied down to follow a proportion according to the conventional provisions during the marriage, or afterwards. The aliment, during the life of the husband, is not the rule, because an aliment was at that period also due to the husband. At the same time, the claims made by Lady Caithness are too high. As to the mournings, the burden of them lies upon the executor, as was established in the case of *Tarsappie*. In doubtful cases, I am not for departing from decisions. As there is no jointure-house upon the estate, I doubt whether the burden of the house ought to fall ultimately upon the heir.

PITFOUR. The expense of mourning and aliment, to the term, lie upon the executor. A reasonable time must be given for settling the extent of the moveables of the deceased,—the next term is allowed for that,—meantime, the family of the deceased must be kept up. When a lady chances to live separately from her husband, the case is a little different; but still the principle of law is the same. The benefit she got from the aliment during her husband's

life, is not to be reckoned. *De minimis non curat prætor*. The case of Boswell is the straitest that can be. The aliment was L.200, and the interest of her own money supposed L.100. I propose that she should have L.200 for the half year. I would give as high a sum for mournings as was ever given. As to the jointure-house, it has as much *tractum futuri temporis* as lands or bonds heritable by destination. Besides, the executry must be summed up at the term after the defunct's death, which is incompatible with a *tractus futuri temporis*. The case of an obligation to pay a certain sum, is different from an obligation to pay an annual sum; the first is pure and clear, the second is casual and of unknown extent.

The Lords found the executor liable in the aliment to the term, and the mournings; the heir liable in an annual sum in lieu of a jointure-house. They afterwards adhered to the Lord Justice-Clerk's interlocutor, modifying L.300 for mourning, and L.50 *per annum* for a jointure-house; and of consent modified L.200 for aliment to the term.

Act. J. Boswel. *Alt.* D. Rac, R. M'Queen. *Reporter*, Justice-Clerk.

1767. *March 5.* WILLIAM ELLIOT and OTHERS, *against* GEORGE MALCOLM.

ANNUALRENT.

If due on sums arrested.

[*Faculty Collection*, IV. p. 383; *Dictionary*, 550.]

KAIMES. As the price of land bears interest, Why should not the price of stocking?

PITFOUR. The question as to interest has varied much of late years: formerly, a demand for interest was *strictissimi juris*; but now, when one is *lucratus*, he is thought liable for interest in equity. I do not know any case where the rule as to interest on the price of lands has been extended to moveables.

PRESIDENT. No practice has carried the demand of interest so far as is claimed in this case. Interest is due on a merchant's account because of a *mora*; but here the money was locked up, and Malcolm had it not in his power to pay it.

COALSTON. There is great equity that, where one retains my money, he should pay interest for it; but with us, in law, interest is not due unless *ex lege pacto vel mora*: nothing of this kind here.

AUCHINLECK. The money was to have been paid at the Martinmas after finishing the bargain. So there was a term fixed: had a bill been granted, there would have been a legal claim for interest. Interest would have been due had there not been a compearance for the creditors: *dies interpellit pro homine*. Why not so now when Malcolm reaped a benefit by the interpellation of the creditors.

PRESIDENT. The Court has never so far extended the maxim of *dies interpellit pro homine*. See case of *Lockhart of Carnwath* and *Walston*.

PITFOUR. I agree that the case of merchants' accounts does not apply : *dies interpellit* is not enough. Where then was the use of denouncing?

HAILES. Thinks interest is due from July 1766 ; for, at that period, the creditors called upon Malcolm to consign in the hands of a banker : and, if he had consigned, and the money had perished, the loss would have fallen upon the creditors, not upon Malcolm ; and, as soon as they intimated their willingness to run the risk, he ought to have consigned. As he did not consign, he ought to pay interest at the bankers' rate of four per cent.

The Lords at first found no interest due, but afterwards, from the special circumstances of the case, found interest due at the rate of four per cent, from the Martinmas after the bargain, adhering thereby to Lord Stonefield's interlocutor.

Act. D. Armstrong. *Alt.* Hay Campbell.

1767. June 26. MRS HELEN STEVENSON *against* COLQUHOUN GRANT.

COMPETITION.

Competition betwixt an arresting Creditor, who had obtained a warrant to sell the goods arrested, and a creditor who afterwards poinded.

[*Faculty Collection*, IV. p. 109 ; *Supplement*, V. 649. *Kaimes's Select Decisions*, p. 329 ; *Dictionary* 2762.]

PITFOUR. There are two points ; one that an arrestment does not prevent a subsequent poinding, even although a forthcoming should be raised : the other, if the goods are *in manibus curiæ*, that no poinding can proceed. The two decisions in the petition relate to the case of the goods being *in manibus curiæ*. In the present case, I thought that, although there was an interlocutor of the Ordinary for a sale, yet that nothing had been done in consequence of this interlocutor, not so much as any intimation of the order. If a bankrupt debtor has cattle in my inclosures, and if an arrestment is used in my hands, and a forthcoming brought, but no intimation made to the debtor, if he sells, the purchaser is safe. Such were the principles on which I proceeded, but now I incline to be of a different opinion : Upon a reconsideration of the case, I do not think a poinder is in the same situation as a purchaser. A poinder is going on in a course of legal diligence ; he may be stopt, though a purchaser cannot. Here there is, in effect, an interlocutor in the forthcoming, though not extracted ; arresters of goods, *ipsa corpora*, ought not to be in a worse situation than arresters of a sum of money. The order to sell implies a decret of forthcoming.

MONBODDO. I think that a purchaser of the goods would not have been safe, because the subject was litigious. But the doctrine of litigious will not apply to the case of other creditors. Although another creditor has inchoate diligence,

I may point in order to complete my diligence. My difficulty is, that the order granted by the judge is not equivalent to a decret of forthcoming : if the goods had been sold, no doubt would have remained : but, in this case, they were still the property of the common debtor, and might therefore be affected by the diligence of the creditor.

COALSTON. The legal effects of arrestment two-fold. 1st, To preclude the arrestee from disposing. 2d, To preclude the common debtor from disposing. But still it is inchoate diligence and no more. Legal proceedings in the forthcoming will not exclude pointing. The only question, Whether is the order of the judge equivalent to a decret of forthcoming ? It is not. Suppose that the debtor had granted a warrant to point the goods, this would have hindered a pointing to proceed. The warrant of the judge is no more than the warrant of the debtor. My difficulty is as to the decisions quoted. Whether am I to follow my own ideas, or the decisions ?

GARDENSTON. For the present judgment of the Ordinary. I cannot make a distinction where there is no real difference. The style of a judgment, when goods are to be sold, must be different from that of a decret of forthcoming in a sum of money ; and the only difference is in style, for the same thing is intended in both cases.

KAIMES. When goods are once *in manibus curiæ*, no pointing can proceed. Why so ? because such goods are under the power of the Court. And how can a pointing deprive a Court of that power ?

Repel the defence on the pointing, and remit to the Ordinary.

Act. Swinton, *tertius.* *Alt.* A. Lockhart.

Diss. Monboddo.

1767. July 16. JOHN TAYLOR and OTHERS, *against* The CONVENERY of the TRADES of ABERDEEN.

COMMUNITY.

A clerk to an incorporation appointed for life, is entitled to object to an assistant being joined with him, though he thereby suffers no diminution of salary.

[*Faculty Collection, IV. p. 293. Dictionary 13,128.*]

COALSTON. If there had been a vacancy, the corporations might have named an assistant and successor ; but they could not add an assistant during the life of Taylor, who had a liferent office. I do not think that, in strict law, a successor can be named, while the office is full ; but it is not time to try that question, as the nomination of a successor cannot take place till the demise of Taylor.

HAILES. I do not approve of survivancies. The granting them is making a contract with posterity, to which posterity does not consent. We wish to have our own hands free ; why should we tie up the hands of those who are to come

after us? Survivances are sometimes authorised by inveterate usage; but here I do not see any such usage. The first example is that of *Farquharson* in 1724. He was named conjunct clerk as well as successor; and he paid a sum of money to the society for this favour: Possibly the taking the money might have bound the corporations. The only other example is that of young *Taylor* in 1756; but, as he died leaving his father the present clerk, that example only shows what powers the convenery assumed, but not any acquiescence of the corporations in the actual execution of such assumed powers. This question, however, is, as has been observed, premature. As to the power of naming an assistant, the convenery has no such powers; though, I observe, that, in the present case, they went so far as to assume a right of bestowing a share of the perquisites on the assistant. [Who was to have the custody of the books? Was that to be given to the assistant, notwithstanding Taylor's liferent right? If it was not, how could the assistant act?]

GARDENSTON. No injustice is done to Taylor in naming an assistant, who relieves Taylor of part of the trouble, without drawing any part of the profits. As to survivances, I think them incongruous and inexpedient, unless established by immemorial practice.

ALEMORE. I shall reserve my opinion as to survivances, until that question comes properly before us: Meanwhile, I think that the convenery had no power to conjoin Watson in a liferent office: that was a step to pave the way for a survivancy.

PRESIDENT. I hate survivances, and ever will hate them: but that is not the present question. It was the survivancy that occasioned this favour done to Taylor, in naming an assistant to relieve him: this the convenery could not do. Although Watson renounced all perquisites during Taylor's life, yet, in the nature of the thing, one acting assistant will draw perquisites.

The Lords altered Lord Auchinleck's interlocutor; and found that the convenery had no power to conjoin Watson in a liferent office, without the consent of Taylor; but found it was premature to determine the point as to the survivancy.

Act. W. M'Kenzie. Alt. H. Dundas, D. Rae.

1767. July 16. JOHN MITCHELL against DAVID ADAM.

SASINE.

An Infeftment, in a right of annualrent granted by a person not infeft, proceeding upon the precept contained in a disposition of the property in favour of the granter of the annualrent, was found *inept*. *valid & preferred in a competition with a posterior assignation.*

[*Faculty Collection, IV., p. 291. Dictionary, 14,335.*] *see also Hamilton's case.*

PITFOUR. As Mitchell was infeft on John's precept, I do not see that the assignation was inept. A procuratory and precept may be assigned *qualificate*. *The granter is* An annualrent may be established in a burgage holding, although there cannot be subaltern infeftments in such holding. The objection to the want of registration is only competent to one having a prior right. A hundred heritable bonds, and as many adjudications, will be overturned if this interlocutor stand. *reference to the*

An adjudication is no more than a right in security for payment. If my debtor is not infeft, I must take his author's procuratory and infeft myself on it, and upon that obtain charter of resignation from the superior. The next creditor will do the same as to the reversion, so that the precept will never be exhausted.

ELLIOCK. A sasine is a good right, *quoad* the granter; but, if not registered, is not good *quoad* extraneous persons.

KENNET. The son might have conveyed either the whole or a part of the precept; but this has not been done. An assignation of a precept will not do for establishing an infeftment of annualrent.

GARDENSTON. If we hold that it is not in the power of a man, having a personal right, to grant a disposition which may be made real, the consequences would reach far.

COALSTON. One having a personal right may denude himself totally or *qualificate*: If so, why may he not grant a right of annualrent. If Robert Watt had granted a disposition in security, and infeftment had been taken on the precept, it would have been good; why might he not also have granted an infeftment of annualrent?

BARJARG. A disposition in security is different from a disposition of an annualrent.

MONBODDO. A right to a precept of sasine is a personal right: it may be divided like a real right; it is assigned in right of the person having the real right. The example of an adjudication is in point: it is a redeemable right in security, by the operation of the law, as much as an infeftment of annualrent is a redeemable right by the operation of the party.

PRESIDENT,—observed that the fact has been imperfectly stated; for that the disposition and infeftment bore earth and stone, as being an absolute disposition of lands.

The Lords altered and preferred Mitchell; but remitted to the Lord Ordinary, (Kennet,) to hear parties upon the point of registration.

Act. J. Douglas. *Alt.* J. Grant.

1767. July 17. ALEXANDER MARTIN *against* ROBERT WATT.

JURISDICTION.

The Court of Session found not competent to try a question between two custom-house officers, concerning the division of a seizure.

[*Supplement*, 5—495.]

BARJARG. The question might have been determined in Exchequer; but I think it may also be determined in this Court.

GARDENSTON. We have enough to do of our own, without interfering with the business of another court. It is *pars judicis* to stop where an action is incompetent, although the parties be willing to proceed. This I learnt from Lord Armliston when I first came to the bar.

JUSTICE-CLERK. There is a foundation in common law for the action: the one party has chosen a jurisdiction, that of the Sheriff, and the other party has acquiesced, and has brought the cause to this Court.

PRESIDENT. The distribution of the revenue belongs to the Court of Exchequer: what can more relate to the revenue than the arbitrary division of seizures, according to the regulations of the Court of Exchequer.

ALEMORE. The seizure goes to the informer: if the division of it has been taken under the cognizance of Exchequer, this Court ought not to interfere; but, if the Exchequer has left the division to be adjusted by the parties, the jurisdiction of the Exchequer will not be exclusive.

JUSTICE-CLERK. I recollect that disputes of this kind have been often determined in the Treasury Chamber of Exchequer. I was moved by the party having brought this trifling affair before the Sheriff without any objection on the part of the defender; but this is no good *ratio decidendi*. I would keep the line of jurisdiction separate.

PITFOUR. The declaring of seizures belongs to the Exchequer. Shall we snatch at the opportunity (*an rapienda est occasio*,) to take upon us an inferior part of jurisdiction, that of dividing the seizures when declared.

COALSTON. This a suit, and an account concerning forfeitures. There is a remedy in Exchequer, and that remedy is daily used. This court ought to take no cognizance of it.

The Lords found the action not competent, and altered Lord Elliock's interlocutor. They also found no expenses due.

Act, G. Buchan Hepburn. *Alt.* G. Wallace.

1767. July 17. GEORGE GILLENDEERS *against* JOHN BIRTWHISTLE.

PROMISSORY-NOTE.

Recourse was sustained against the indorser of a Promissory-Note, though the strictness of negotiation on bills was not observed.

[*Faculty Collection*, IV. 292; *Dictionary*, 12,258.]

AUCHINLECK. A promissory-note does not admit of proper diligence. Here demands for payment were made.

COALSTON. In England, promissory-notes are the same as bills. This man was an Englishman, and supposed the promissory-notes in question to be the same as bills. The provision of recourse strengthens the supposition—but I do not think that the same strict negotiation is necessary in promissory-notes as in bills. The equitable powers of the Court might be interposed were there supine negligence in this case. I cannot but lament that the English law, as to promissory-notes, does not extend to Scotland.

JUSTICE-CLERK. Promissory notes are not entitled to the privileges of the statute, but they are entitled to some privileges—they must be negotiated. I felt a disposition for the cause of the stranger, but there is not any *mora* in this case sufficient to relieve him. Promissory-notes are not yet in the same state in Scotland as they are in England.

HAILES. Of the same opinion—but thinks no expenses due—Mr Dingwall, from want of memory, committed many mistakes in his averments before the Ordinary, and thereby threw a sort of obscurity over the cause.

Adhere to Lord Kennet's interlocutor, but found no expenses due.

Act. A. Lockhart. Alt. R. M'Queen.

1767. July 22. JOHN LAYCOCK *against* THOMAS CLARK.

FOREIGN.

Execution ordered for costs awarded by a foreign decree in terms of a foreign statute.

[*Faculty Collection*, IV. 113; *Dictionary*, 4554.]

HAILES. The opinions of some of the foreign lawyers, quoted in the answers, carry the *comitas* to an extravagant length—but the defender seems to abridge the *comitas* too much. A foreign decree will be held just unless its injustice be shown. The defender is for introducing a sort of *anti-comitas*, and holds that the foreign decree must be held unjust until proof be brought of its justice; and what proof can the pursuer bring? Certainly none but the evidences who were examined at the trial in England. Now the defender, who requires this, has also asserted that the English witnesses cannot be compelled to appear, and that the Scotch witness, M'Bean, is not to be believed—so that his argument not only requires that the pursuer should instruct the justice of the decree, but also tends to show that he has not the means for instructing its justice. Further, the English court was a court chosen by the defender himself—and he must stand to its sentence. Had Laycock been cast, Clark would have received damages. When Clark is cast, it is reasonable that Laycock should receive expenses;—otherwise there would be an inequality and a hardship.

MONBODDO. Clark was the provoker, and chose the *forum*. A contract entered into in a foreign country is effectual in this country. Here, by Clark being the pursuer, there is a tacit contract. The note subjoined to the decision by President Dalrymple is good law.

PITFOUR. If a man is pursued in a foreign country, and a decree is obtained, the question is, how far will this avail in another country? The general solution is, that execution will go upon evidence of the justice of the cause. This is the case of a defender acquitted; and *exceptio rei judicatæ* is certainly binding. But the difficulty is as to the expenses given,—how far are they actionable in another country? I think there is no reasonable ground to doubt that they are. Clark chose the court. Can he object to its sentence? He brought his action before an English court—he knew that it was to be determined by the verdict of a jury, and he knew that that verdict was a sort of blind judgment—because there is no record of the proceedings in such cases. The au-

thority of the statute of Henry VIII. awarding costs where the party is nonsuited, is at least as good as the authority of the judge awarding costs *ex proprio motu*: so Clark cannot complain that the court was obliged to award costs. The statute is a wise one. Even in this country expenses are commonly given on an unsuccessful action for damages; but I doubt as to expenses in this court, on account of the judgment pronounced by this court in the case of *Brunton*.

GARDENSTON. This case clear upon the principle *quod quisque juris*.

AUCHINLECK. For adhering and for expenses. If this case were like that of *Brunton*, I should be clear against expenses; for the decree of the King's Bench was most iniquitous in that case. Here the decret is just.

COALSTON. For adhering, 1st, Because no iniquity is shown. 2dly, Because Clark choose his *forum*. 3d, Because we are to presume the decree just—as the defender did not follow the method allowed by the law of England—that of bringing the cause under review by a second trial: But I am clear against expenses. The defender, Clark, has erred in law, by supposing that Laycock was bound to show the equity of the decree. We have no evidence whether the decree was just or not. As to the case of *Brunton*, there was a special verdict, from which the decree appeared unjust. In all the former cases of this kind, either the justice or injustice of the decree appeared *ex facie* of the decree—but here no such justice or injustice appears.

JUSTICE-CLERK. Here, we cannot conjecture whether the decret is just or unjust: but our *ratio decidendi* is obvious—a suitor must subject himself to the law of the country where he voluntarily brings his action. In every action upon the case in England, when the pursuer is nonsuited, costs are awarded. The pursuer must have known this law, and he was bound, by his suit, to yield obedience to it. We see that the judges of the King's Bench have done nothing but what the law obliged them to do.

KAIMES. The rule of making a man liable where he chose his forum, was a good one while judges continued in the condition of arbiters—but not so now: there is neither contract, nor *quasi* contract, when a man institutes his action: the maxim on which this cause must be determined, is a more simple one. From the time of *Mrs Prescott's* case it is established in this country that, *ex comitate*, there is a presumption in favour of the foreign decree. The case of *Brunton* was different—there the decree appeared unjust *ex facie* of the verdict. At the same time I incline for no expenses.

AUCHINLECK. Here the decree just, as upon an Act of Parliament.

ALEMORE. The *comitas* goes so far as to presume justice. He who seeks to get free of the judgment, must prove injustice. The presumption and the verdict of the jury, which is the legal evidence, are in favour of Laycock. The fact is established by the verdict—the consequence is established by an Act of Parliament. Clark has said nothing against the decree, but tells a story—we can get a party to tell a story in every case.

PRESIDENT. I always thought the decree of the King's Bench in *Brunton's* case was a monstrous bad one, though I was employed as a lawyer to support it. A foreign decree must be held just until some proof is offered of its injustice. I see nothing against this decree. Suppose the case had gone to the

House of Lords, the verdict would have been held good as unimpeached. It was competent to try the question of the invention before a jury, for the patent is *periculo petentis*—it is meant to hurt nobody, and in law it hurts nobody. I am hurt when I see a foreigner forced into a litigation in this Court.

The Lords adhered to Lord Kenner's interlocutor, and found expenses due. No vote as to the principal point. As to expenses,
Diss. Strichen, Pitfour, Coalston. *Non liquet*,—Kaimes.
Act. J. Dalrymple. *Alt.* A. Lockhart.

1767. July 23. ROBERT BLACKLOCK *against* The TUTORS of ALEXANDER GOLDIE.

SALE.

Where the buyer's faith is followed, the Sale is good, although the price has not been paid.

[*Faculty Collection*, IV. p. 290 ; *Dictionary*, 14,157.]

COALSTON. Here is a strong plea in equity. Had there been a mutual contract, there would have been no difficulty. But this is not precisely a mutual contract. On one side, there is a disposition: on the other, a bond to pay the price. The question is not between a seller and the singular successor of the purchaser, but between a seller and the original purchaser.

The same rule ought to hold in this case as in mutual contracts. The question is of *causa data causa non secuta*. The Court has found that, though a wife assigned a bond of provision to her husband, yet that it was not effectual till the wife was secured in the provisions which were the cause of that assignation.

MONBODDO. If it be true that, in contracts of sale, whenever the price is not paid, I can take back the lands, great innovations in law would arise: the seller must make *this* a part of the bargain, by the *lex commissoria*: if he does not, then *fides habita est de pretio*, and he has no recourse. If Blacklock has been overreached, he may reduce the sale; but till then it remains good.

JUSTICE-CLERK. If this covenant had rested upon a minute of sale, there could have been no doubt as to the declaratory conclusions of the libel: the only question is as to the *species facti*. I am moved with Lord Coalston's argument, but I rest my opinion upon this:—The case here is between an agent and his client; Goldie, a man of knowledge, trusted by an ignorant rustic. Goldie conceived an early inclination to have this man's bargain off his hands, and did, by his letter, now printed, convey an idea that the bargain was a bad one: he was intrusted with a letter from Blacklock to the original seller: he suppresses it, which desired either to have back the money or to get a clear right to the lands: he strikes a bargain with Blacklock.

The bargain ought to have been executed by a minute of sale, and Goldie

knew that it ought to have been so executed : But the contrary was done ; Goldie took a right to the land, and left Blacklock nothing but a personal ground of action. The same construction, in these circumstances, ought to be put upon the transaction, as if Goldie had done what he ought to have done.

ALEMORE. If your Lordships can preserve the law, and at the same time give back the land to Blacklock, I have no objection : the last opinion, indeed, preserves the law, but then it goes upon fraud, which is not proved. There is no hypothec upon the land for the price. How long is this supposed right in the seller to last ? If for one year, why not for twenty ? The contract of sale is completed as soon as the price is paid, or, which is the same thing, as soon as *fides habita est de pretio*. If there is such a hypothec, then it must be good against third parties as well as against the purchaser. If bonds for the price of lands are good against the lands, then all other creditors contracting personally with the purchaser, will be cut out. Equity is nothing, if by *equity* we mean relief against a hard case : equity can only prevail upon certain principles, as certain as law.

GARDENSTON. In this case the seller is no more than a creditor. Where is the equity here, more than in the case of any other creditor, who followed the faith of Goldie, and lent his money upon Goldie's personal security ? I am ready to listen to any plea of fraud. If this demand were to be sustained as to heritage, why not also as to moveables ? This would overturn many a principle of law.

PITFOUR. Here no fraud is qualified ; but there is a conclusion, from the nature of the contract, that the contract should be implemented. This is not a rule of equity, but of plain common sense. A purchaser cannot say, I will not tell you whether I will pay the price or not. It is true that no irritancy is to be implied,—it must be expressed ; but it is still competent to say to the purchaser, You must determine whether you will implement the bargain or not. This is laid down in the decisions quoted for the pursuer, *Maitland of Pitrichie* against *The Laird of Gight*. Were there a minute of sale, there could be no doubt.—Here there is a disposition ; but, as there is no infestment, this is equivalent to a disposition contained in the minute itself, and it is no more. The alternative action of declarator is competent while third parties have no interest. There is no hypothec here, for that is a right which affects the subjects in whatever hands they may be found.

ELLIOCK. This question, in itself, may be of little moment, but it is of great moment whether a simple obligation to pay the price of lands sold, shall be a real burden upon the lands, as much as if payment of the price had been made the condition of the sale.

MONBODDO. The decision of *Pitrichie* related to a mutual contract. Even in a minute of sale the one party cannot be obliged, by means of a declarator, either to give up the sale or to pay the price.

ALEMORE. Here is no hanging up or uncertainty left, for the seller has the purchaser's bond, and he may do diligence upon it. We must not confound a mutual contract with the present case.

KAIMES. Here there is no mutual contract, but a disposition for a price paid ; the bond for the price is a common debt,—there are no *termini habiles*

for a mutual contract. If a mutual contract, as alleged, then even Goldie's infestment would be ineffectual.

AUCHINLECK. The security of a seller in a minute of sale is, that the obligation to pay is the counterpart of the obligation to sell, and that the one is not effectual without the other. When a disposition absolute is granted, and a separate obligation for the price, the buyer has nothing to ask from the seller: the seller has nothing to ask but the price: there is no longer any connexion between the price and the lands. It may be right in a seller to take the precaution of making payment of the price a condition of the sale; but, if he does not, how can we do it for him? Could we bring this case under fraud on the part of Goldie, it would be of less moment.

JUSTICE-CLERK. As a judge, I am not bound to give an abstract opinion; I must determine according to the circumstances of the parties.

COALSTON. Had infestment been taken, it would have been impossible to set aside the sale. But here there are only personal rights: it is still competent for the seller to hold the lands till the price is paid: this was determined in *Selkirk's* case, Dec. 1721.

The Lords assoilyied, and altered Lord Barjarg's interlocutor.

Act. R. M^cQueen. *Alt.* A. Crosbie.

Diss. Justice-Clerk, Barjarg, Coalston, Pitfour, Hailes, (the last upon the circumstances of the case as stated by Lord Justice-Clerk.)

1767. July 29. JAMES MACHARG, against MAJOR COLIN CAMPBELL.

FOREIGN.

A judgment of a court-martial abroad, finding a Scotsman guilty of murder, is evidence for awarding an assythment in Scotland.

[*Fac. Coll. IV.* p. 282; *Kaimes's Sel. Dec.* p. 326; *Dict.* 12,541.]

AUCHINLECK. The defender was guilty of assassination, but there were not numbers enough in the court-martial to condemn him to die. If Major Campbell had been brought before the Court of Justiciary to be tried again for the murder, he would have thought it hard, had the defence of *res hactenus judicata* been repelled. It is ascertained that Major Campbell was guilty of the crime charged: the question is, how far is assythment due? Here it is said, that a crime committed in one country cannot be tried in another.—Will any man pretend, that, if a person commit treason in a foreign country, he may plead, when he is tried at home, that the crime cannot be punished as having been committed abroad? If the defender had been brought before the Justiciary Court, he might have been tried, convicted, and executed.—He has been convicted, but not executed: the question is as to assythment being due or not due. Had the defender been punished with death, there would have

been no assythment due, because *actio pœnalis non transit in hæredes*. In all cases where a man injures another, he must assyth, and this independent of what he may have exacted from him by the public : The defender would have been liable in damages had he given Captain Macharg nine wounds, and none of them mortal. Shall he be liable in no damages when he gave nine wounds that were not mortal, and two that were mortal ? If a man is wounded, he is assythed ; if he is killed, his friends are assythed. I can never believe that, by the law of Scotland, any man could ever have been allowed to kill his neighbour, or even the king, upon payment of a certain number of cows. The present case, by being new, is obscure : we always go upon supposition that the proper punishment of murder is death, because the best of laws has so said. It is uncommon to pursue a man for the assythment of a murder committed by himself. If the court-martial had acted properly, and hanged Major Campbell, it would have put an end to the question. Instead of hanging, they only cashiered. The difficulty is, that no money can be taken for the life of a man. A like difficulty occurred in a question for damages, on account of adultery, pursued by the husband. It was pleaded, that there was no *æstimatio* there. The Court, however, sustained the action. Injury done must be repaired ; if a man maims another, action lies for reparation. Shall he, in effect, have a premium for murdering another ? This would be the case were damages awarded for maiming, none for murdering. As I have no doubt of the law, so neither have I of the fact ; for the court-martial so found, and it is not said that the court-martial went too far. On the contrary, it went not far enough.

PITFOUR. The defender argues from the exceptions, not from the rule ; which is erroneous. The rule lies for reparation : damages must be repaired. I admit the exception, that no assythment is due when the man suffers death : but that is not the exception here. The reason of that exception is, that, in the case of murder, the ultimate sentence is death and confiscation of moveables ; and no subject for assythment remains : the fire swallows up all. In murder, the lands of the murderer cannot be affected ; for murder in landed men is treason, and that implies forfeiture of lands. In other crimes, our law is satisfied with forfeiting life and moveables.

With respect to the arguments of the parties, the pursuer is right in the law ; the defender in the fact and practice. Every country held murder punishable with death ; but the practice was for lesser punishments. The assythment, or damages, is not to be inflicted where death follows. Then the ultimate punishment is inflicted, and it is reasonable to suppose that this absorbs every other punishment. Both families are then reduced to the same state. This rule does not apply here. The sentence is not the thing that gratifies the family of the killed, or relieves the family of the killer, but the execution of that sentence. The family of the person killed has an interest : it is *actio rei persecutoria*, but *sub conditione* that reparation be made, or the party suffer death. Put the case that the Court of Justiciary, after a verdict finding guilty, should commute the punishment, assythment would be due. The terms of the Act, 1661, confirm this. I think that Major Campbell has escaped by the mercy of the sovereign. I do not see that the Court was divided in opinion as to his guilt,—it was divided as to his punishment. There were not two-thirds of the members for the capital punishment. This sentence would have had no effect unless the king had con-

firmed it: if the king had not confirmed it, Campbell must have been tried anew.

The matter resolves into this:—If the crime is not tried *ob vindictam publicam*, there is no assythment, because no proof. If the crime is tried, and the person escapes punishment, assythment is due: the interest of the nearest in kin is not hurt by the pardon.

The question is, Whether is the crime proved? We are not to enter into the proof if the court-martial was a legal court and its sentence legal. This is not the sentence of a foreign court, but of a court established by the same sovereign authority under which we sit, viz. statute 27th Geo. II. and the last article of war. It is part of the sovereign's power to make articles of war. In the case of an army being in an enemy's country, courts-martial are necessary, and authorised in the Act of Parliament, which only limits the king as to crimes committed in Great Britain other than military. I do not relish the doctrine that crimes can only be tried *in loco delicti*: this would often prevent the trial of crimes altogether. Suppose Martinico had been recovered by the French, who was it that could have tried Major Campbell?

With respect to the judgment of the Court-martial, it is just the same as if a jury had found a man guilty of killing, but yet he was not liable to capital punishment: this may happen in a verdict upon the Act 1661. Suppose that the Court had found the crime proved, but had also found circumstances sufficient to extenuate and to restrict to an arbitrary punishment. The same thing in effect has been here found. This does not exclude assythment from the analogy of the Act 1661.

JUSTICE-CLERK. Power of the court-martial clear,—so also the jurisdiction of this Court. My doubt arises from the sentence of the court-martial, which alone must be the rule. My difficulty is, what is the meaning of the Court finding that Major Campbell was guilty of the crime charged, whether *two-thirds* of the court, or only a *simple majority*? If we could have, upon record, evidence that a *majority* of an English jury found a person guilty of murder, no assythment could be due, because an English jury must be unanimous, and, consequently, in such case there was no proper sentence. I do not see that the law has been impeded in its course: It does not appear that the legal majority of the court-martial found Major Campbell guilty of murder; so that he was acquitted, in effect, of the murder as laid in the charge. Independent of this, I am not a legislator to regulate the action of assythment: were I such, I might think that even the ultimate punishment is not sufficient to acquit the estate of the criminal from a reasonable reparation. I see that the law of assythment does not apply to all the cases where equity might extend it. It is only due where the course of the law is impeded: I do not see the distinction between assythment for murder and the damages for murder.

STRICHEN. A sentence condemnator of a foreign court is not *res judicata*, though a sentence absolvitor is. In the noted case of *Buchanan of Machar*, a sentence of the Court of Justiciary was not held a *res judicata* in the Court of Session. How then can this judgment be held as *res judicata*?

PRESIDENT. The case of Buchanan was attended with many extraordinary circumstances. In the case of Malloch all the arguments with respect to jurisdiction were treated; and whether the judgment of the Court of Justiciary was

to be held *probatio probata*. An action for pecuniary reparation lies against the heir of the malefactor. So says Sir George M'Kenzie. No assythment is due when the *ultimum supplicium* is inflicted. I cannot well reconcile this with the notion of assythment being a pecuniary recompense. It is rather a retribution to the private party when the punishment is not inflicted. If the public interferes, or if a man withdraw himself from punishment, then the right of the private party revives,—a pleading of pardon is an acknowledgment of guilt. Was there ever an assythment granted after a transportation pardon? The Act 1661 adds to my doubts. It supposes that no assythment is due when capital punishment is inflicted. The act mitigates the rigour of the law, and, on that account, gives an assythment; because, if it had not so done, the Court might have thought that there was a punishment, and, therefore, that there could be no assythment. If assythment is for damages, it must go against the heir as *rei persecutoria*. I cannot find the trace of an action like this, nor can I understand how the statutes have always spoken of one pleading upon a pardon, if assythment is due after a trial and sentence.

As to the jurisdiction of the court-martial I have no doubt, nor upon the jurisdiction of this Court. The Court being of opinion, implies the whole Court. This is explained by the after words, *there not being a sufficient number*. Have great doubt as to holding this decree as evidence: there is no difficulty in the case of a pardon, which is a confession of the crime. There is no occasion to look into the evidence. If a verdict carries a contradiction in its bosom, how can the Court of Session put it in execution.

I doubt as to the argument, that *actio pœnalis ex delicto non transit in hæredes*. I doubt as to the *favor fisci*. I doubt as to any action of reparation when a capital punishment is inflicted. In *Broughton's* case the greater punishment was understood to absorb the interest of the private party. When advocate, I did not appeal that question, because I understood that the judgment would be affirmed. The sentence of the Court-martial must be held adequate to the offence; for it is a sentence on the crime by a competent Court.

MONBODDO. The question resolves into this, Whether is assythment due as a reparation to the private party, or is it the punishment of murder? Assythment is the punishment for murder. Murder, in ancient times, was not punishable with death: it was thought absurd to take away the life of one citizen for the death of another.

BARJARG. The difficulty is, how far are there *termini habiles* for assythment, when the sentence finding a person guilty is carried into execution? There is no vestige, in our law, of assythment being granted, unless where a pardon was granted. At the same time, I do not see that in ancient times murder was never punished with death. That punishment was expressly provided in the law of Moses for the crime of murder; and the law of Moses is ours whenever our own law is silent.

ELLIOCK. I shall say nothing of the evidence of the crime that appears from the proceedings of the Court-martial. Formerly almost all crimes were punishable by a pecuniary mulct, not by death. But then the criminal was put out of the protection of the law, and the relations of the deceased might kill him. He therefore made a composition both with the public and with the relations of the deceased. Afterwards, when the law inflicted the punishment of

death, the relations had no revenge to take, no composition to stipulate : the criminal was dead, the penalties *non transibant in hæredem*. Our law is still upon this footing : *letters of slains* import no more than that the relations of the deceased have no resentment to gratify, nor further composition to ask.

ALEMORE. I think that *assythment* came in place of the ancient composition for the crime of murder. This composition was allowed, partly on account of a defect in power. The legislature was not able to punish. Every clan or independent horde protected its guilty members. Our own history, as well as the history of other nations, affords examples of the turbulent state of ancient times and of the licentious independency of those hordes. Compositions were first established by private contract ; afterwards they were introduced and confirmed by the law. Something also was paid to the prince, either for the violation of his peace, or, as Montesquieu thinks, for obtaining the prince's protection. As these compositions proved unequal,—heavy upon the poor, elusory as to the rich,—capital punishments were introduced. Whenever the law inflicted punishment, composition ceased ; because, by punishment, revenge was satisfied. In the lesser punishments of the law, a conclusion of damages is part of the punishment :—there is no such thing as an assythment for murder when punishment is awarded in terms of law. If the king interposes with his prerogative of mercy, the old assythment returns. It is not the degree of punishment, but the law taking place that excludes assythment. Major Campbell has gone through the whole course of the law by receiving the judgment of a competent court. Suppose that, in the Justiciary Court, a pannel should be convicted of murder ; if upon this the judges, instead of condemning him to die, should banish, I doubt whether assythment would be due.

KAIMES. I admit the principles, but I deny the conclusion ; my idea is, that we are misled by confounding two different things under one word. The punishment of crimes was formerly by fine ; hence *vergelt* ; but assythment of a very different nature. It arises from the common law,—it is reparation for the loss of a friend. What is here sought is not assythment to gratify revenge, but damages. *Damages* means different things. 1. Restitution : if a criminal steals my goods, and is hanged, I am entitled to get back my goods. 2. *Solatium* : a man is killed, ought not the damages to be made up to his wife and children ? This case is not so strong ; but still there is due a reparation or *solatium*, different from a gratification of revenge. If a man gains the affections of a woman, and then deserts her, there is a *solatium* due, though there is no direct patrimonial loss.

I doubt as to the evidence before the court-martial, which, though good as to the matter tried, is no more than *testimonium* in this new action ; but then I will presume in favour of the decree, when no objection is made to it.

GARDENSTON. When a man is murdered, and the murderer escapes punishment, assythment is due. Here, from the judgment of a legal court, there is evidence of a murder. The decree of the court-martial is not a foreign decree : but this makes no difference, as the decree is founded on evidence.

I am not for tracing antiquities too curiously : these are rather matters of speculation than matters of fact. I will consider the law as it now stands. When one commits murder, and is convicted, if the king interposes and prevents the execution of the capital punishment, reparation is due. Here the court-martial exercised the king's power and commuted the punishment. The king approved

of this, and thereby interposed his clemency. Had he not approved, Major Campbell would have been subjected to a second trial. As to the case put by Lord Pitfour, it is not supposable that the Court of Justiciary would interpose in the case of a verdict returned, finding guilty of murder, and inflict a punishment less than capital, unless you also suppose that the Court had power to pardon or commute the punishment, as the Judges in England have by special commission. Should the king commute a sentence, by granting a transportation pardon, I make no doubt that reparation would be due.

KENNET. I do not consider this as an action for damages. Our law is not all derived from the civil law, or from the law of Moses: part of it is derived from the sources of the laws of barbarous nations. If this were an action of damages, it would not be taken away even by death. The Court, in determining assythments, has never entered into a question of the extent of the damages. It has always considered the quality of the offender, and the extent of his estate. This shows that, in propriety of speech, assythment is not the same thing as damages.

COALSTON. The action of assythment lies before the civil court. This court-martial had the power of judging by Act of Parliament. The judgment is the judgment of a proper court; still it is the decree of a foreign court, and therefore evidence of the justice of that decree must be had. Such evidence is *here* produced. This court is competent. There is no occasion for further proof. The case of *Machar* was particular. *There* the verdict in Justiciary was improper.

The ground upon which some of the Judges have stated assythment is too wide. There is a two-fold claim; one at the instance of the public, another at the instance of the private party. Neither can discharge the claim of the other. When one is guilty of a breach of the peace, and of an assault, either the procurator-fiscal or the private party may pursue. Their actions are separate and independent. The same is the case in spuilyies. If this holds in lesser crimes, why not in greater? If my house is burnt, will not an action for reparation arise to me? Why not then in the same manner, when my son or my father is murdered? Whenever my private interest is affected by a crime committed, action lies at my instance.

With respect to the statutes concerning the assythment for murder, a doubt had arisen whether a remission did not bar the private action. The statutes were made to remove that doubt. When one took a remission before trial, it implied an acknowledgment of the crime; but this implied acknowledgment would never have a stronger effect than an actual proof before a competent court. It never could be the intention of the statutes to preclude any man from reparation.

HAILES. Considered the assythment sought as a reparation of damages, which was due when not actually or virtually discharged. That, in this view of the case, assythment, according to his opinion, was due in *Mrs Harriet Stewart's* case. But, as the court had just now found assythment not due in that case, he considered himself as bound to submit to the judgment of the court, and therefore to give his voice against assythment in this case.

The Lords found assythment due.

Act. A. Lockhart. *Alt.* R. Campbell. H. Dundas. R. Elliock.

Diss. Strichen, Justice-Clerk, Barjarg, Kennet, Hailes, President.

1767. *August* . JOHN BAXTER and The PARISHES of ROXBURGH, MAXTON, and ECKFORD, *against* The PARISH of CRAILING.

POOR.

Poor are a burden on the Parish where they have resided for the three last years.

[*Fac. Col. IV.* 296 ; *Kaimes's Select. Dec.* 329 ; *Dict.* 10,573.]

HAILES. I incline to think that the statutes rather point to the parish of nativity than the parish of residence ; but then the universal practice of the nation in maintaining the poor has been to consider the parish of residence as bound, not the parish of nativity. Laws relating to police may go into desuetude, or may be explained by general usage, in a sense different from what was probably the sense of the legislature. There are laws which prohibit any person from being in a tavern after ten o'clock at night : These laws have never been repealed, and yet no one will say that they are still in force. They relate to police, and they are abrogated by disuse. No one example can be given of the parish of nativity being bound to maintain the poor. Many certificates are produced to the contrary. The only example given is that of the Sheriff of Roxburgh, who sometimes makes the parish of nativity liable, sometimes the parish of residence. The last decision of the Court, *Parish of Edrom*, 1745, is for the parish of residence. The decision, *Parish of Inveresk* 1757, is not in point ; for *there* the case was of a little girl who had no choice of her residence, and was taken from parish to parish without any act of her will. Besides, she, from her tender years, could not have benefited the parish of her residence. I presume that the judges, who pronounced the decision 1745, had in their eye the general practice over the nation ; and this shows that the practice has been as inveterate as it is general. If the Court now alter that rule, the consequences will be dreadful. All the poor's houses in the cities of Scotland will be cleared of inhabitants. At Edinburgh the inhabitants are composed of persons from every county and parish. The poor were admitted into the workhouse, not on account of the place of birth, but of residence. Glasgow is supplied with inhabitants principally from the West Highlands. When these strangers become unable to labour, they are admitted into the poor's house. If the parish of nativity is to be the rule, they must all be sent to the respective places of their nativity. The cities which owe their prosperity and opulence to the labour of those strangers, will have no burden of them in their old age. And where are they to be sent ? To the Highlands and Islands, to places where the legal tax for maintaining the poor will not be suffi-

cient to maintain them, and where there are not inhabitants enough to supply them by private charity, were they so inclined. The consequence is, that all those unhappy people will be starved. The north was the *officina gentium* of old; it is now the *officina urbium*. It would be hard were all the industrious poor to be remanded back to their place of nativity as soon as their place of residence can no longer profit by their industry. The consequences are dreadful, and this perhaps may warp my judgment, when I give it as my opinion that the poor must be maintained by the parish of residence.

KAIMES. I incline for the rule upon residence during three years. The privileges arising from birth may be renounced: the great principle of charity is towards the neighbourhood. We invite foreigners into the country: can we suffer them to starve because not born with us?

MONBODDO. If I were here to make law instead of explaining it, I should be for the *locus domicilii*; but the law is direct for the *locus natalis*.

GARDENSTON. I, on the contrary, would be for the place of birth, as people generally pass the best part of their life *there*, and *there* form their connexions: but the law has so determined, and I have no latitude left.

AUCHINLECK at first said, that the Acts of Parliament ratified proclamations without telling what these proclamations were. The whole laws make the natal parish the rule. We cannot alter the law. That the question has not been tried oftener is owing to the spirit of charity which prevails in this nation.

But afterwards, upon a second hearing, he said:—I approve of the distinction between a law of property and a law of police: the former is immutable,—the latter varies with the age, and is changed according to times. The poor-houses at Edinburgh and Glasgow are a stronger proof of the opinion of the nation than a thousand certificates. If you send away the poor to the place of their nativity, you must detain the children in the place of their nativity, and so separate the parents from their infant children.

ALEMORE. The general thing complained of in this country was the run of sorners and sturdy beggars. The statutes were made for repressing of them. In 1600, residence or settlement was reckoned a good cause for providing of the poor “such as was born, or had residence for seven years.” The Acts 1661 and 1663 change seven years into three years. To dismiss the poor, God knows whither, would be inhuman or impolitic. The beggars to be sent elsewhere, are the idle vagrants. A person becoming indigent by age, accident, or disease, is not one of those meant by the laws.

PITFOUR. This is a case which has been disputed often; yet there is no discrepancy in the statutes concerning it. The first distinct statute is that of James V, 1535, by which the poor were to be provided in their own parishes. The distinction made between proper poor and vagrants is a mistake: the Act 1579 proves the contrary; the Act 1663 is clear; that Act is held as repeated in the Act 1672. By a reference therein, the proclamations which have the force of statutes are upon the same footing. Expediency is not so clear as the words of an Act of Parliament; besides, the expediency is on the side of the statutes. A settlement for the poor, by residence, is the great nuisance of the law of England; hence, every parish is set at variance with its neighbours. Lawsuits about settlements are computed to cost from 30,000 to 40,000 pounds sterling

per annum. This struggle to prevent settlements, by reason of their effects, is one great cause of the depopulation of England.

The place of birth is the great rule : upon it, even the crime of treason depends. The *first* decision of this Court is not to the purpose ; for *there* the parties had no fixed residence. The *second* goes upon a misapprehension of the law, applying the clause as to birth, to vagrants only ; though, if the parish of birth is to take place in vagrants, *a fortiori* ought it to take place in indigent poor. The error of that *second* decision, 1745, was corrected by the *third* decision 1757.

Laws are not to be construed by what may happen in extraordinary cases. If the poor have children, they may chance to be separated : the father sent to one parish, the child kept in another. Should the poor have children, those children will maintain them. (Here it is supposed, 1. That it is a singular case for a poor man to have children : 2. That, if he has children, they will probably be grown up : 3. That the children of a poor man are able to maintain him.)

If work-houses are established, they must be governed by the law ; and the law says, that only the natives of the parish are to be maintained. I suppose that, in Edinburgh, the work-house is upon so extensive a plan, that the contributors are willing to maintain every poor person, though neither a native of the city, nor established *there* for three years. The certificates in process do not prove any immemorial usage : they only reach back for a few years.

COALSTON. The maintenance of the poor depends upon special statute. The place of birth may be more easily discovered than the place of residence. Am of the opinion last delivered : the question is to be determined by Acts 1662 and Acts 1672, and the proclamation 1693.

ELLIOCK. The statutes mentioning the place of nativity as liable, are in desuetude. By the universal custom, strolling poor are sent to the parish of birth, but industrious poor are uniformly maintained in the parish of residence. There is good reason for this : Manufactures cannot be carried on without cities ; cities cannot supply themselves with inhabitants. Inhabitants must be had from barren countries where subsistence is wanting. It would be a contradiction to take the inhabitants of barren countries, employ them in manufactures, and, when they become unable to work, send them back to the country which could not maintain them while they were able to work.

It is not the settlement of the poor, but the mode of taxation and the bad use made of the money levied, which is the nuisance in England. Thus, in the parishes of St James's, Westminster, at St Martin's-in-the-Fields, L.13,000 *per annum* is levied as poor rates, and yet all the streets are crowded with beggars. In St George's, Hanover Square, the gentlemen of the parish have got into the vestry, and have overawed the church-wardens : the consequence is, that the poor-rate is moderate, and the indigent are provided for without a strict inquiry whether they have obtained a settlement or not.

KENNET. The practice of the country is for residence, otherwise you must separate parents and children.

BARJARG. The laws are obscure, but practice is plain : the inconveniences of laying the maintenance on the natal parish are not partial but total.

PRESIDENT. I have no terror of the consequences, in determining that the



parish of residence must be burdened : there is more danger from a contrary judgment.—It would occasion great expense. I approve of a uniformity of decisions. I think the decision 1745 is the last in point : the decision in 1757 is not in point. I dread the consequences of a judgment contrary to that of Edrom. The greatest part of the people in the poor's house of Edinburgh have no title to be there, if birth is to be the rule : those very people whose industry has benefited the metropolis, must be sent to distant counties where their industry never reached.—The law distresses me. I had drunk it in as a principle of the law of Scotland, that residence is the rule, and never considered the law sufficiently. The practice is for residence being the rule.

At the second hearing he said :—The poor in Edinburgh are maintained upon the principle of residence. If the place of nativity had been the rule, the poor's house would never have been established. I am now satisfied, (from Lord Alemore's argument,) that the statutes which occasioned the difficulty, do relate to vagrants. All the certificates are on one side ; none on the other. This proves what the universal practice is. Nothing can be more just than that people should be maintained where they have bestowed their labour,—nothing more unjust than to throw helpless people into a helpless country : neither are we bound down in law, although the statutes should be considered as pointing out the place of nativity as the rule ; for desuetude and contrary usage may repeal a law. *Consuetudo optima legum interpres.*

JUSTICE-CLERK. I inclined at first for the parish of birth, 1st, Because there seemed no ambiguity in the law ; 2^d, Because this introduces a more equal burden : the last decision, 1757, proceeded upon the principles of the proclamation 1693. I was however shaken in my opinion, and I took an opportunity of inquiring in many places, as at Glasgow and in the shire of Ayr, and I found that nobody had the idea of the place of birth being the rule : it strikes at the foundation of the laws of humanity, to suppose that a poor man must be maintained in one parish, his wife and children in another. I never understood that there was any complaint in England as to the establishing a residence :—it is the mode of the taxation, as has been well observed, that occasions the complaint.

GARDENSTON. I still think that the Legislature meant to make the place of nativity the rule ; but I have little doubt that those laws are altered by disuse. In matters of police, such alterations may be. From the observance of this rule, no bad consequences are to be dreaded. The place of residence has been established to be the place burdened, and yet no grievance has been felt in Scotland by the establishment of this rule.

“ The Lords found Baxter entitled to be maintained by the parish of Roxburgh,” (in which he resided for the last three years.)

Act. J. Swinton, *tertius.* *Alt.* P. Murray. *Reporter,* Auchinleck.

Diss. Pitfour, Coalston, Monboddie.

1767. December 15. ANDREW WAUCHOPE of NIDDRY against ARCHIBALD HOPE.

REMOVING.

The Act 1555, with regard to Warnings, does not apply to Coal-works.

[*Faculty Collection, IV. p. 121 ; Dictionary, 13,847.*]

COALSTON. I wish that Mr Hope had been more explicit in confessing or denying facts. The question is as to the Act 1555. It relates to lands, and has been so understood by the practice of the Court: it does not apply to houses in towns or to houses in the country without lands, to soap-works, to coal-works. Removing is not necessary. Notification was given.

MONBODDO. I give great weight to the old decisions; *Hope* gives the true reason of the law, "*because, in coal-works, there are no terms.*" In rural tenements there are *terms* or times for sowing, &c.; so that a tenant must know whether he is to be allowed to reap that which he sows. In a case, 1741, *Lord Darnley*, no warning was required after the expiry of a tack of feu-duties. There is nothing in the objection of Captain M'Dougall not being called, for the tack was assignable, and was assigned.

AUCHINLECK. A case of the same kind occurred within these few weeks. Baird had a tack of the dung of Portsburgh: he pretended that a warning was necessary. This was justly repelled by the Court.

"The Lords remitted to the Sheriff to decern in the removing."

Act. D. Rae. Alt. R. Blair. Reporter, Stonefield.

1767. December 24. CAPTAIN JAMES STEWART against ALEXANDER ROBERTSON.

FREEHOLDER.

The Court of Session cannot receive new evidence from a complainer against a judgment of the Freeholders.

[*Faculty Collection, IV. 123 ; Dictionary, 8874.*]

BARJARG. We cannot touch the first question, because the House of Peers has found that it is *extrajudicial* to determine *in causa*. When there is a preliminary objection, this case is like that of *Sir John Gordon*.

KAIMES. The freeholders did right in not admitting the complainer without evidence.

COALSTON. There is a difficulty here. The practice in the cess-books was, to name the heritor instead of the lands: Is it necessary to require a connected progress to shew what the lands were?

AUCHINLECK. The proprietor for the lands at the time, pays cess, and this fixes what lands are meant; but here Lord Strathmore's valuation is *in cumulo*, so that it does not appear to whom the Laird of Nevay's lands belonged. Suppose that no progress were produced, could we take it for granted that the lands of the Laird of Nevay, in 1683, were the Kirkton, &c.? If we could not, how could the freeholders?

KENNET. A man does not know what objection may be made; he therefore is not bound to come prepared with his whole proof.

PITFOUR. There is an enix declaration in the judgment of the House of Peers on Sir John Gordon's case, which points out the rule for us to walk by.

ELLIOCK. New arguments may be brought before this Court, but not new titles. It matters not what lands the Laird of Nevay had: How does the complainer connect with him?

On the 19th December 1767, "The Lords found that the freeholders did right in refusing to enrol Captain Stewart; and therefore dismissed the complaint, and found him liable in the penalty and expenses."

On the 24th December, they adhered.

Act. Hay Campbell. *Alt.* A. Elphinston.

1768. January 14. **MAGISTRATES OF LINLITHGOW, and OTHERS, against CHARLES ELPHINSTON of Cumbernauld.**

PROPERTY.

Can a River be appropriated, or any of its feeders?

[Kaimes's *Select Decisions*, 331; *Dictionary*, 12,805.]

KAIMES. What is a river? Not only the main stream, but its branches: all partake of the same nature. Neither a river nor any of its branches are to be diverted. Every one has an equal right to them in their course. I distinguish between water *publici juris et privati juris*. *Perennis aqua* is *publici juris*; but here I see no proof of *perennis aqua*. There is a lake or morass. If the water in it were to be sacred, so as not to be diverted while within the property of the heritor of the whole circumjacent ground, this would be extending the rights of a river much too far: there is no evidence that this loch is part of the river. The Roman law, and common sense, have connected the idea of a

river and of a perpetual run from a lake ; but there is no evidence here of any perpetual run, perennial stream, or *aqua viva*.

MONBODDO. An experiment in natural philosophy is not common in law. Here, however, it has been made, and properly made. From this experiment it has been proved, that there is no perennial run from Fanniside loch : upon *that* I lay my opinion. The possession of the water is not sufficient. *That* is the case of every superior mill, but gives no right to divert the water arising in my ground. I am the master of the water in my own ground, and I may use it as I please, unless it has been appropriated by inferior heritors. Fanniside loch is a *stagnum*, in the sense of the Roman law. A *servitus aquæductus* out of a *stagnum* is anomalous for a servitude,—must have a *perpetua causa*, which a *stagnum* has not. Nevertheless, we may suppose a case where a servitude out of a *stagnum* might be created : Suppose that a canal were drawn out of a *stagnum* under the direction of the inferior heritors, this would be a servitude, however anomalous. I should be for assailing, although the mills were to be stopped, for I determine according to principles, be the consequences what they will ; but there is no danger of this, for the water from Fanniside loch only issues at those times when the inferior mills have no occasion for it. The distinction in the Roman law between *flumen publicum* and *aqua privata* determines this case. *Publicum flumen* is not, as we commonly suppose, a navigable river, but *flumen quod perenniter fluit*. The Prætor's edict applies to every boat ; but *here* there is not *publicum flumen*, but *aqua privata*, as appears on evidence : the water is made up not only of springs, but of snow, rain, collections of waters from ditches, and from an *opus manufactum*. This, then, is a *stagnum*, not *aqua perenniter fluens*,—it is like a fountain rising in one's own ground.

JUSTICE-CLERK. It is proved that, in the original state of this loch, when overflowed by natural causes, its course was to Avon. I do not think that this course can be diverted, for there is a perpetual cause *ἡ δυνάμις*, as Cujacius expresses it. The *opus manufactum* is in cutting through a natural bank, and making a dam in the west loch. The inferior heritors submitted to this, as beneficial to themselves in drought or frosty weather : but then this does not give to Mr Elphinston any exclusive right to the loch, or enable him to carry off the water.

GARDENSTON. There are two sorts of lochs in Scotland : one a stagnating loch, not the source of running water ; the other a loch, the source of running waters. That one which is stagnating is the property of the person in whose lands it lies, though arising from springs as well as from rain or artificial runners. That which is not stagnating, but affording running water, is not the property of the person in whose lands it lies. The loch in controversy is a stagnating loch, and therefore, in its natural state, it might be used as the heritor pleased. There has been an *opus manufactum*, whereby a benefit has arisen to the inferior heritors ; and *this* they now hold by prescription, in the same way as a mill would have, had it been built before the water of the loch joined the rivulet.

KENNET. I do not think that Mr Elphinston is bound to keep up the dam,

nor is he prevented from draining the loch ; but he cannot divert the water. I am not clear whether there is here a *perpetua causa*, but I think that there is.

When the cause was a second time advised, he said :—When a natural run of water is from one man's ground to another, and that run is used, it cannot be stopt, even although an *aqua perennis* ; but, where there is a *torrent*, it may be diverted. The difficulty is as to the fact. I rather think that, *here*, there is no continual natural run to give a *jus quæsitum* to the heritors. There are marks in the ground, but they may have been owing to speats. The experiment shows there is no natural run. A servitude *in dubio* is not to be presumed.

PITROUR. The claim is a servitude : defence, no servitude without a *perpetua causa*. This is branched out into two considerations. 1st, No perennial run—*Edo*, Always in the defender's power, and therefore possession precarious. At first this view of the cause appeared strong, but I do not think the defence conclusive. If the superior heritor has a primary use, the inferior heritors have a secondary. As to *aqua perennis*, it is laid down in the civil law. I will not say it is a subtlety ; but still it ought not to be extended. All greats are made of smalls. If you allow *small* waters, not perennial, to be taken away, what will become of *great* ? If an express servitude can be established by consent, as is admitted by Lord Monboddo, why not by possession ? Here there is both *aqua viva* and rain water. How shall we divide them ? Perhaps I am under a prejudice from the great favour due to mills.

ALEMORE. Great is the favour of mills. Every lawyer, from the time that he read *regiam majestatem*, gets a hankering after mills. But is this to stop every improvement upon waters, which may be connected with mills or other engines ? All stagnating water, then, which overflows from time to time, must be kept sacred. This is not a perennial water ; it is a water like most of the fish-ponds in England. If there had been no *opus manufactum*, the water would have run out, and the mills would have had the use of it when they had no occasion for it. Cujacius's authority is not in point : he speaks of a lake with a perpetual outlet.

AUCHINLECK. When a person claims water, he must show that he has either a servitude or a right to it. If he has a perennial burn running through his ground, he has a right to it. If there is a stagnating water not on his own ground, he can have no right to it, otherwise than by grant or servitude. If the proprietor of land has a right to dispose of the water before it falls into a lake, why not afterwards also, if there is no servitude on it ? He may drain it. Here there is no perennial run : A man, by using his own water with dams, can never give a servitude to the persons who use the water. The fact is this : here is a large loch, it is now a collection of waters, owing to the situation of the ground. It is increased *opere manufacto*. The heritor may do what he pleases with the water which falls into a hollow place within his own ground. If there were a drain from it, there would be no water but what falls from the heavens. Whenever the water leaves the loch, it is every man's burn ; but still there is no perennial run from the loch.

COALSTON. Here is a great body of water arising from natural causes. Its natural course is into the Avon. It is necessary for the mills. It is not in the power of the superior heritor to divert it from its natural course. Here there is a perpetual cause, though, during a great drought, no water can run. If

you require a perpetual flow of water in order to make a *perpetua causa*, half the mills in Scotland would be ruined ; for there are few brooks in Scotland which flow perpetually from one end of the year to the other.

PRESIDENT. The subtleties in the civil law, as to servitudes, are not received into our law. Here there is a repository of water : the natural course is to the Avon. A *perpetua causa* is what arises from a natural cause. Mills are built upon the faith of this water continuing to flow. Shall I allow the heritor to turn it away ? Water rising in my ground is mine, for my private uses, but I cannot divert it.

On the 14th November 1767, the Lords assoilyied the defender. On the 14th January 1768, they adhered.

Act. C. H. Brown, H. Dundas. *Alt.* W. Wallace, R. M'Queen.

Diss. Gardenston, Coalston, Elliock, President. Justice-Clerk, Pitfour, and Kennet, had dissented from the first judgment ; but they changed their opinion.

1767. July 29 ; and 1768, January 15. *Mrs HARRIET STEWART against The EARL of FIFE.*

REPARATION.

Nature of an Assythment.

[*Sel. Dec. No. 258 ; Dictionary, 18,904.*]

PITFOUR. The punishment of murder is death. Such is the voice of nature. Such the law of God, not judicial but moral. Not delivered to the Jewish nation, but to Noah, the father of mankind, at the renovation of the earth, after the flood. If that punishment is inflicted, no more is due. When that punishment is not inflicted, reparation is required. By punishment, I do not mean what is the elusory. There are two differences between this case and that of *Campbell*. 1st, *There* the crime was proved ; *here* it is not. 2d, *There* the defender was secured from punishment ; *here* that matter is *in pende*. I do not think that, in the present state of the case, a proof of the fact can be allowed. The rule is *non debes prejudicium facere publico judicio per privatum judicium*. I grant that the treason may sometimes be proved where the consequences are less than capital ; as if a vassal, pardoned for treason, should have his estate demanded by the superior, on the clan act. The reason is, because such proof cannot hurt the defender nor infer punishment. The pursuer will have an assythment, but not now. If Abernethy compounds, it will be paid : if he is condemned, there will be the reparation by blood : if he dies abroad, the assythment will be due, because it will then be impossible for him to undergo the ultimate punishment. This seems reasonable ; though the question has never been tried, as it seldom occurs. The only objection is, that *actio ex delicto non*

transit in hæredes; but the answer is, the action was commenced during the life of the party, and so *lis contestata*. I shall only observe farther, that this action of assythment points out one of the many struggles which this nation has had for liberty against the crown; and, in this struggle, we have been more successful than in England; for, *there*, if the Crown grant a pardon, the appeal of murder lasts but for a year. *Here*, if the Crown grant a pardon, the right of private parties remains safe, and without limitation.

COALSTON. If I were of opinion that assythment is only due when the king stops justice by a pardon, I should think that assythment was neither due in this case nor in Campbell's. But I think assythment is due whenever one person is hurt in his property by another. It extends to all crimes, small and great. By the Act 1584, *assythment* is applied to "fire-raising, and other odious crimes:" this is, reparation to the private party. I do not think that a pardon is necessary in order to found assythment. The provision as to that in the statutes, was upon two accounts: 1. It might have been thought that the King's pardon might have excluded the claim of the private party: 2. That suing a pardon implied a confession of the crime, which consequently made assythment due. *Here* there is no proof of the murder; but, if assythment is due, such proof is competent, and this Court may grant it. It is most eligible that the conviction of the crime should proceed before the criminal court; but, if the criminal is put out of the power of that court by flying, the civil court ought not, upon his own fault, to stop short. Thus, adultery may be tried before the criminal court; but this will not prevent the proof of adultery being brought into the civil court. There is less difficulty in supposing that assythment may be recovered now, than after the death of Abernethy. I have only to add, which I omitted, that the statute 1425 shows that assythment is due whenever there is a damage sustained.

GARDENSTON. In this case assythment is not due. At first I thought it absurd that there should be assythment due when the King interposes, and not when the party himself interposes, by removing from justice; but I came to see that assythment was not reparation, but a *solatium* to the friends of the deceased when the course of justice was stopt. This appears from the fact of no assythment being due when the party suffers death. This is a *solatium* to the friends of the deceased, but is no reparation. If assythment is given here, the Court may do wrong two ways: 1st, Abernethy may hereafter be tried, condemned, and executed, or he may be tried and acquitted: in either view no assythment could be due.

KAIMES. The assythment mentioned by most of the judges is the old composition for crimes, or vergelt. It is to be observed, that, by the laws of King Ina, published by Lambert, c. 5, assythment in that sense was due if a man retired to a sanctuary, because his own act, in retiring from justice, cannot profit him: hence assythment in the old sense due in this case, because Abernethy fled; not in the other, because Campbell stood his trial. But, independent of this, *here* action lies for reparation of damages. If Leithhall had recovered, he would have been entitled to damages and a *solatium*: he is dead, and the crime committed upon him becomes thereby greater. Shall we hold that there is neither damages nor *solatium* due to his friends?

DECISIONS RE

Lords found no assythment due, and assoilyied.
 t. Cosmo Gordon. *Alt.* J. Ferguson.
 ss. Auchinleck, Coalston, Elliock, Stonefield, Hailes.
 A petition was presented against this interlocutor; on advising which, with
 wers, the following opinions were delivered:—]

HAILES. When this cause was advised, the cause of M^r Harg was also advis-
 ounded on that of Lord Stair, who expressly says, that an assythment is for re-
 aration of damages; and I thought his authority sufficient for determining me.
 The Court, however, found that no assythment could be claimed. Immediately
 after, they gave judgment in the case of M^r Harg. I considered that the two
 cases depended on the same principles; but, desirous that decisions might be
 uniform, I gave up my own opinion, and voted against an assythment in Mac-
 Stewart's case: the Court, however, found assythment due. Now that Mrs Harriet
 and am for an assythment. It is said that here no proof of the murder; therefore
 no assythment. This signifies nothing; for we are determining a relevancy, and
 proof may be hereafter brought into Court, I come back to my old opinion,
 for Abernethy may hereafter be reponed against the fugitation, and stand his
 trial. If he is acquitted, there is no claim for assythment; if he is condemned,
 and suffer death, there is as little. I answer, that the civil court cannot stay
 their proceedings, because Abernethy has withdrawn himself from trial. If he
 should hereafter return to Scotland, stand trial, and be acquitted, he may have
 repetition of the assythment: if he should be condemned, and suffer death, his
 heirs may have repetition of the assythment. But the consequences of such
 events are not the present subject of deliberation.

COALSTON. Our ancient statutes show that assythment is due for all crimes;
 and that, whether a pardon intervenes or not. It is admitted, that, if Abernethy
 had been guilty of robbery, assythment would have been due. Why not, when
 guilty of murder. It is true that a precise value cannot be put on the life of a
 man; but still the judge, *ex arbitrio*, may determine the value. The decision
 in the case of M^r Harg shows the sense of the Court, that assythment was
actio rei persecutoria: we cannot find otherwise here.

BARJARG. I can distinguish this case from that of M^r Harg: *there* evidence
 of a murder, *here* none.

MONBODDO. I thought that the case of M^r Harg was doubtful; but I was
 for the judgment. There, there was an extension of the law of assyth-
 ment, which I thought just. Campbell was tried, but escaped punishment by
 means of the form of the sentence. Here there is no proof at all: Neither
 sentence nor pardon. Assythment is the old punishment of murder, not a re-
 paration.

AUCHINLECK. I was against the interlocutor. I was convinced that it would
 have been iniquitous that a man should be guilty of the highest of crimes, and
 yet be subject to no punishment. This case is clearer than M^r Harg's: there a
 sentence, such as it was; here none. It is true, there is yet no proof of the murder
 as there was in the other case; but a proof may be brought,—and here we are
 only upon the relevancy.

KAIMES. There is nothing in the objection that Abernethy may yet be tried

in the Justiciary Court. Two different courts may take up the same *species facti*, and give different judgments: This is distressing, but there is no help for it. *Assythment* has two senses: it is the punishment of a crime, or it is a *solatium*. Mrs Harriet Stewart asks the last, but not the first. We ought not to be misled by names. Had she asked damages, there would have been no doubt. She asks assythment as damages. Why should there be a doubt?

GARDENSTON. This is not a claim of damages, but of amends. It may often happen that the death of the person murdered may benefit his surviving relations. Suppose that a worthless elder brother were knocked on the head, his next brother will be a gainer; yet still revenge may be desirous of satisfaction. One does not like to see the murderer of one's relation going about without chastisement. Human nature revolts at this, and yet there may chance to be no damages. In the case of M'Harg, assythment was awarded, because murder was established, and yet the punishment of murder was not inflicted.

PITFOUR. Both judgments were right. There is no interference. In assythment, two things are required. 1. That the crime be proved. 2. That the offender be secure from punishment. In M'Harg's case, both concurred; here neither. It seems very strange that a civil court should lead a proof of what may infer a capital crime, and, in effect, try a man for murder. I do not understand the distinction between damages and assythment.

PRESIDENT. You every day take proof of crimes, *ad civilem effectum*. Thus, by the clan act, treason might be incidentally proved *ad civilem effectum*. Here there is no question as to the extent of the assythment. No proof taken in the civil court can affect Abernethy, on a criminal trial. I thought that no assythment was due in a case of this kind; but your Lordships taught me otherwise in M'Harg's case: the only difference between the two cases is, that Campbell did stand a trial, and that Abernethy did not. In M'Harg's case, the court went upon this, that assythment was reparation: if so, then Abernethy's flying the country can never deprive the creditor of his right of action for reparation.

ELLIOCK. The claim of assythment is both for reparation and damages. In most cases both concur. No proof to be brought here can affect Abernethy in the criminal court.

JUSTICE-CLERK. I was clear against the judgment in M'Harg's case: it was a singular case. This is a common one in the law of Scotland. There is no evidence that ever assythment was granted when there was only a fugitation. I am not to judge according to my inclinations: I must take the law as I find it upon our records: In them there is no vestige of such an action of assythment as this: nor am I at liberty to sustain it.

On the 15th January 1768, The Lords sustained action for assythment, and altered their former interlocutor.

Act. A. Crosbie. *Alt.* A. Lockhart. *Diss.* Justice-Clerk, Barjarg, Pitfour, Gardenston, Kennet, Monboddo.

1768. January 16. GEORGE SKENE of Skene, and OTHERS, against DAVID OGILVIE of Ascreavie, &c.

UNION.

Effect of a Clause of Union.

[*Dictionary*, 8792.]

MONBODDO. As to the *union*, there is no difference between Spence's case, and the case of Linlithgow. Tradition is necessary in transferring the dominion of lands. When there is no dispensation, this tradition must be on the lands. Whenever the union is dissolved, *sasine*, on the part of the grounds alienated, is required.

JUSTICE-CLERK. There is no question as to the power of the Crown to insert such clause of dispensation; and here there is a charter, with the common clause of dispensation. Lord Panmure might have taken infeftment anywhere; he might also have divided his precept: if so, why could he not, by conveying the charter and precept, have entitled his assignee to take the like infeftment, with the like advantage of the dispensing clause? *Union* is not dissolved by a personal conveyance of the charter and infeftment as to most of the lands: nothing dissolves the union but the execution of the precept. Craig says, *si dominus consenseat*; that is,—if there is an infeftment taken, from that moment the union is dissolved, and a new tenement arises. To the same purpose Lord Stair speaks; so also Mr Erskine. By a *sale*, he means a sale completed by infeftment, which is a sale in the language of law; besides, here are different infeftments to certain persons in liferent, and Lord Panmure in fee. This infeftment is not null as to Lord Panmure. Why should it be null as to liferenters? How can I hold the union as subsisting with respect to the *fiar*, and yet dissolved with respect to the liferenter? The various cases of titles made up in this form show, that many securities rest upon this footing.

PITFOUR. What is the origin of dispensations? Law requires that infeftment be granted on the ground of the lands. The King may unite discontinuous lands. Originally, lands were united in three ways,—by regality, barony, or tenendry. The united subjects were considered as one; consequently, one *sasine* was sufficient for one tenement. If nothing is said to the contrary in the charter, such *sasine* may be anywhere. As to the question, How is union dissolved?—whatever separates any part of the land from the jurisdiction, must dissolve the union. If the vassal grants subaltern infeftments, still there is no dissolution; for the regality, barony, or tenendry, the *unum quid* still subsists: but, the moment that a part of the lands is sold, to be held of the Crown, so much is struck off: however, the union still remains as to the rest. Craig went too far in supposing the contrary. A dispensation is a power to take infeftment upon different subjects, as if they were united: If the subject is divided, there is an end of the union; for a dispensation is but an adumbration

of a union. This union, by dispensation, has strong effects. If the proprietor takes infeftment upon the whole at one place, the infeftment is good; so also, if he takes infeftment by parcels, his heir may do the same thing, though the Chancery gives no dispensation as the Exchequer does. He may grant sub-feus, and may transmit the union; but, if he sells off a subject, to be held of the Crown, How can the subject be any longer united? (Craig's opinion is misunderstood: he means, if you give off a parcel which is without jurisdiction, you do not give the barony, so that the union is void.) Craig says, that a liferent does not dissolve the union. This is conveyed from a decision in Balfour, which is obscurely expressed, but means, that, when the liferent ceases, the union revives. If I could see a long constant practice contrary to principles, I would be moved with it,—I would be delicate as to what is past, and make an Act of Sederunt as to what is to come. But nothing of this nature here occurs. The only inconveniency will be, that people will be at more expense in making votes; for precepts are not split unless for the purpose of making votes.

PRESIDENT. I first thought the infeftments were not good; then I dreaded the danger to the records, from a supposed practice of granting such infeftments; but no such practice is proved. The instances given relate only to election causes. Infeftment is necessary upon the ground of the lands; so says the law. Unless the Crown dispense with this, I cannot see how the Crown's vassal can communicate the dispensation to as many persons as he pleases over separate subjects. The assigning the precept is a new thing. Wadset-rights were the invention of a great lawyer, (President Craigie;) that of splitting precepts was still later; consequently, the taking of separate infeftments upon the dispensation must be late also. It is true that a personal right will not dissolve the union: the union continues till the infeftment is taken. But then the question is, Whether is such infeftment properly taken upon the footing of dispensation, or is it null as taken upon the footing of the dispensation? If the lands are discontinuous, or if the tenements are separated, the infeftment will not be good. There is no longer any *totum quid*.

COALSTON. The present question is occasioned by the custom of splitting precepts. It is fit to inquire as to the legality of this practice. It is new. It is only used in the creating of votes. I would not set it aside for the time past; but I would wish to see an Act of Sederunt for preventing it in time to come.

“The Lords sustained the objection, founded on the nullity of infeftment, by virtue of the dispensation.”

AUCHINLECK. As to the infeftment in the mill, by the symbol of earth and stone, when a part is lopt off, there is no longer any union as to that part. In this case there is a mill, without infeftment by the symbols of clap and happer, but with the symbols of earth and stone; and it is said, that the dispensation bears, that symbols of earth and stone shall be sufficient: and this is well said, for this part of the dispensation relates not to the union, and it subsists although the union be dissolved. The King's grant is the warrant of the infeftment; and it allows infeftment to be taken by the symbols of earth and stone.

DECISIONS REPORTED BY

KAIMES. In this cause, the only difficulty was, that union could not be dissolved till infeftment was taken; and, consequently, that though the infeftment dissolved the union, yet that it was good, in terms of the dispensation contained in the union. My answer is, that the personal disposition divests, for that the disposer could not take infeftment upon the lands disposed. But, as to the mill, there is no difficulty, for the King cannot dispense with the accustomed symbols.

AUCHINLECK. The power of the King cannot be doubted; for there is practice and innumerable examples.

PITFOUR. I think, that, if the dispensation as to the union ceases, the dispensation as to symbols ceases also.

GARDENSTON. If you say that the dispensation is still good as to the symbols, why not also good as to discontinuous lands?

COALSTON. Where tenements are discontinuous, and where the contiguous subjects are of separate natures, there must be separate infeftments. The Crown may make discontinuous tenements to be one, or may make one symbol serve for another; but, when once there is a disunion, the liberty of taking one infeftment for many ceases, as does the liberty of using one symbol for another.

PRESIDENT. There is a dispensation both as to infeftment and as to symbols. How can the clause be divided? Here Craig's simile of the sheaf of arrows applies:—As Lord Panmure broke the union, he can derive no benefit from the clause of dispensation.

The Lords sustained the objection, that the symbols of earth and stone were used in the infeftment of the mills.
Act. H. Dundas, &c. *Alt.* A. Lockhart, &c.

1768. February 6. **MR DAVID DICKSON against THOMAS, EARL of DUNDONALD, and OTHERS.**

PROOF.

An extract of the sentence of a Presbytery deposing a minister, found not to be evidence of the fact; the minutes from which the extract was taken not having been signed by the moderator.

[*Faculty Collection*, 128; *Dictionary*, 7464.]

HAILES. Here are two questions:—1st, Whether there is evidence of deprivation? 2d, Whether, if there is such evidence, the Court can refuse it effect, by sustaining the charge for stipend. As to the first, W. here a formal extract of a most informal sentence. The minutes from the extract is framed are confused, detached, blotted scraps. The sent at this day unsigned. It was no reason for not signing it, that the m

did not approve of the sentence. His signing would not have implied his approbation of the sentence; but only that such a sentence was pronounced. The presiding member of a court must not decline the signing of a judgment, because the judgment is not agreeable to his own opinion. If the moderator had scruples, and if his brethren meant to indulge him in them, they ought to have appointed a moderator *pro re nata* to sign the sentence. Instead of this, they suffer it to remain unsigned, and to appear so in judgment. The law requires all judges to sign their judgments. Neither the law nor the practice of the church allows the sentence of ecclesiastical judges to remain unsigned. As to the *second* question, I think we cannot determine it, because *here* there is no sentence. Had there been a sentence, the civil court could not have entered into the inquiry whether it was just or unjust. The charger founds upon the Act 1584;—but that plea is erroneous, in two different ways. *1st*, The Act 1584 was a temporary Act, and was repealed by the Act 1592. *2d*, The Act 1584 mentions certain causes of deprivation, which infer loss of stipend; but it does not limit the causes of deprivation which infer loss of stipend. Thus no mention is made of *lenocinium* in that Act, and yet a minister might certainly be deprived of his office for *lenocinium*. Drinking treasonable healths has been the cause of more than one deprivation; and yet the Act 1584 mentions nothing of that kind. The standing law is not the Act 1584, but the Act 1592, which gives a greater latitude to the ecclesiastical courts, and allows *every effect* to sentences of deprivation according to the primitive discipline of the church. And it cannot be disputed that *brawlers* are among those who are said, in the evangelical institutions, to be unworthy of the episcopal office. So that, if the sentence of the Presbytery were regular, I should not hesitate to find that the civil court must hold it to be valid to every effect whatever. But as the sentence seems null, for the reasons already given, I am for finding the letters orderly proceeded.

AUCHINLECK. The question is, whether is Mr Dickson regularly deposed or not? The suspenders say that he is deposed. And they produce an extract of the sentence. An extract from a competent judicature is probative: but still, when that extract is challenged, we must look at the principal. The principal is not signed. There is no sentence. The minutes are interlined; have marginal notes, and detached pieces of paper pinned to them. For aught that we know to the contrary, the Presbytery may have recalled their sentence by some detached writing, which does not now appear. It is a disgrace for any court to produce such absurd proceedings.

PITFOUR. A minister deposed has no right to stipend, and the civil court cannot interfere. But still there must be a sentence. If the moderator did not choose to sign, some one else ought to have been named to sign for him.

COALSTON. Here the objection is, *1st*, That the warrants were not signed. I should have had some scruple upon this head, for the Act 1686 has not been understood to relate to ecclesiastical courts. The other objection is, That the warrants are not probative. We cannot review the sentence of an ecclesiastical court: but, *here*, there is no sentence.

KENNET. Were Mr Dickson *de facto* deposed, the General Assembly alone could take cognisance of the merits of the sentence of deposition. What

ever may be the practice as to signing *ex intervallo*, here there are no regular warrants at all.

PRESIDENT. We have nothing to do either with the deposition or with the settling of another minister ; but here we have no evidence of deposition at all.

On the 6th February 1768, the Lords found the letters orderly proceeded, in regard that no evidence of the deposition was produced.

Act. A. Elphinstone. *Alt.* A. Wight. *Rep.* Stonefield.

1768. *February* 17. GEORGE SKENE of Skene, JOHN ERSKINE, Younger of Dun, and OTHERS, *against* DAVID WALLACE and OTHERS.

MEMBER OF PARLIAMENT.

Interrogatories competent to be put to Freeholders against whom complaints are depending.

[*Dictionary*, 8758.]

AUCHINLECK. I am not fond of multiplying oaths, but we must determine cases of this kind, when oaths are demanded. This *oath of trust and possession* cannot be called an oath of calumny. In many particulars it is an oath of verity, not credulity. It is also, in some particulars, an oath *in jure*. The oath may be put as often as the freeholders choose, which is inconsistent with an oath of verity. If a man swears not resting owing, I suppose that he means, not that the sum was never due, but that he has compensation to plead in such case. When he deposes in general, he may be brought to answer special questions, in order to explain his general averment ; for, if he meant not resting owing by reason of compensation, it is extrinsic, being *in jure*. So it was determined, in *February* 1751, upon report of Lord Woodhall, probationer. *Here* the petitioners are still better entitled to put the special questions ; for the oath of trust and possession is not a reference in the proper sense of the word. Although there may be no back-bond granted, yet there may be an understanding between the parties that is equivalent in law.

MONBODDO. With respect to the common law, there is no great difficulty in allowing re-examinations, when a man swears either in general or ambiguously. The decisions to the contrary are put upon this,—that the party seeking to re-examine had it in his power at the former examination to have put the questions more particularly, and neglected it. A witness, indeed, who once answers, cannot be bound to answer the same questions over again. But the questions now proposed are not precisely the same with those sworn to in the trust-oath. If there were any doubt at common law, it is removed by the statute. The oath 7th Geo. II., is an oath of investigation, and does not exclude any further proof. That oath must be put precisely in the words of the statute. The freeholders

can make no further investigation. *Here*, the freeholders could not examine otherwise than they did. An oath of reference can be put but once. This is not the case as to the oath 7th Geo. II. : it is also an oath *in jure* ; for there are law-words in the oath, as to the import of which even lawyers and judges differ.

BARJARG. This is an oath of verity upon a matter of fact, although it resolves into a question of law ; and, therefore, it is not an oath to be repeated. It may indeed be repeatedly put, but not twice at one meeting. An alteration of circumstances may happen between one meeting and another ; and, therefore, the oath may be repeatedly put, in consequence of such possible alteration.

COALSTON. From the several statutes concerning elections, two things appear necessary : 1. Infestment and possession ; 2. Holding for one's own behalf. The oaths are introduced *ob majorem cautelam* : they do not exclude other proof : a proof of trust by a back-bond would be received. In one case, that of *Sutherland*, a proof by witnesses was allowed. The only difficulty is, that the persons who require this oath, were the same who, at the meeting of freeholders, put the oath 7th Geo. II. This is not an oath *parte deferente* ; for then it would not be allowed to be taken away by any other evidence. The case that comes nearest to it, is that of *Creditors in a Ranking and Sale*. A creditor depones upon the verity of his debt : This oath may be defeated either by writing or by special questions. None of the freeholders can put any question for explaining the oath, so that it is not an oath *deferente adversario* ; but, even upon that footing, I still think it competent to put the questions, so far as special facts are deponed to. A man may not be bound to swear again, but he may be bound to explain facts from which he has drawn a wrong inference. Freeholders, not present at the meeting, have a different interest : they may insist to have the questions put. When one freeholder brings a complaint, it is in the name of the whole ; and each freeholder may take the benefit of the complaint, and state himself a party.

ELLIOCK. This is not an oath *in jure*, but an oath as to facts consisting with a man's own knowledge. I cannot think that a man ought to be convicted of perjury by his own oath. It is true that the Oath, 7th Geo. II., may be repeated ; but that is, because there may be an alteration of circumstances between one meeting and another.

KAIMES. The Oath, 7th Geo. II., is an oath partly of fact, partly of law. The same questions as to facts must not be put again ; but new facts may be inquired into, from which inferences in law may arise.

PITFOUR. If the inquiry now sought is rendered fruitless, it is owing to the freeholders' own blunder : Still there is a difficulty as to putting the oath at the instance of the party who put the trust-oath. But the questions may be put at the instance of third parties, who were not original complainers. There is no great danger of perjury, for they who took the trust-oath may have a wrong apprehension of the consequences of facts ; and thence might consider that vote to be *real*, which the law understands to be *nominal*. The only danger of perjury is, if there be a back-bond ; and *that* is not a probable case.

STONEFIELD. The oath is an oath upon facts. If one freeholder puts the oath, another cannot : all the freeholders are thereby understood to be preclud-

ed. An oath put to a creditor in a ranking is different from this case ; for *there* the oath is put by the Court, not by a party.

HAILES. Notwithstanding all that I have heard, I still hesitate as to the competency of putting the new questions at the instance of the very same persons who had the oath, 7th Geo. II., put to the respondents. It was peevish in the freeholders to put that oath, and it could serve no good purpose ; by it they have brought the Court into difficulties. I do not relish the requiring a man first to swear *en gros*, and then to swear *en detail* ; but I think that the new complainers may crave to have the questions put. They were not present when the oath was put formerly, so that they cannot be precluded by it. They had no occasion to prefer a complaint, because they saw that others had preferred a complaint. If the original complainers had dropt their cause from collusion, *they* could have taken it up. If the original complainers are barred by a personal exception, *they* may proceed who are not so barred.

AUCHINLECK. In a complaint for not inrolling, one freeholder may be called as defender, to save the trouble of calling the whole ; but, in a complaint for enrolling, all the freeholders, except the person complaining, are understood to acquiesce.

MONBODDO. The freeholders are as much concerned to take one off the roll who has no right, as to keep off one who has no title. As the four months are not expired, the new complainers may be admitted.

COALSTON. Formerly all the freeholders were made parties, either as pursuers or defenders. The later statutes only give an easier method of complaining. A complaint once brought brings all the freeholders into the field. The objector is trustee for the whole freeholders.

PRESIDENT. The new complainers may be received. The complaint once brought into court becomes the complaint of all the freeholders concurring : were it otherwise, the consequences would be dangerous. The accidental death of the complainer would quash a complaint, however just. As to the question itself, I think this oath is an expiscatory oath. In England, all proceedings in Chancery are upon oath, and yet they may be and are daily redargued. Thus, again, by the Act 20th Geo. II., a claimant on a forfeited estate may be called upon oath to instruct his debt, and yet, the next day, the oath may be redargued. The oath, 7th Geo. II., was made as a check upon claimants : they themselves were in so far allowed to be judges, whether they had such an estate as entitled them to vote. This is matter of opinion : if they give a wrong opinion, there is no perjury. I know no case where a fact may be proved by witnesses, and yet may not be proved by oath of party : the oath may be repeatedly put at different meetings : It is then an oath put anew ; for a man must swear as to the right on which he stands enrolled. Were this oath to be the only test, the regulations of the law would be eluded : any friend of the party might request him to take the oath, and, it being once taken, all further disquisitions would be precluded.

On the 17th February 1768, The Lords found the questions competent ; but pronounced no special interlocutor as to their competency at the instance of the original complainers or of the new complainers.

Act. Ilay Campbell, J. Swinton. *Alt.* A. Wight. *Diss.* Barjarg, Stonefield, Elliock.

1768. *February 24.* KATHARINE TAILOR *against* WILLIAM WRIGHT.

PRISONER.

One in Prison for a fine, damages and expenses, *ex delicto*, not entitled to the benefit of the Act of Grace.

[*Faculty Collection, IV, p. 129* ; *Kaimes's Select Decis. p. 334* ; *Dict. 11,813.*]

MONBODDO. This case is well stated, and determined by Voet against the pursuer.

KENNET. Will's case cannot aid the pursuer; for part of Will's sentence was to ask pardon at the church door, which he could never do, so long as he remained in prison.

JUSTICE-CLERK. The case of *Malloch* is strong : *there* the king's pardon was found not to give the benefit of a *cessio* to those who were committed to prison for payment of damages arising from delicts.

GARDENSTON. The aliment is only by statute; and there is nothing in the statute which makes creditors liable to aliment persons in the condition of Katharine Tailor, imprisoned for damages the consequence of a delict.

COALSTON. Were it not for the train of decisions, I should have had doubts as to the interpretation of the statute.

PITFOUR. The question is, Whether this damage arose from a crime or from a fault, *levis* or *levissima*? If from a fault, Whether that *fault* is to be considered as a *crime quoad* its consequences?

On the 24th February 1768, The Lords found Katharine Tailor not entitled to the Act of Grace, adhering to the interlocutor of Lord Kennet.

Act. A. Murray. *Alt.* A. Rolland.

1768. *March 1.* MARY VEITCH *against* ALEXANDER PRINGLE.

SERVICE AND CONFIRMATION.

An elder brother intromitting with the effects of the younger, on his death; found to have vested in himself a provision, with which he was burdened.

[*Faculty Collection, IV. p. 343* ; *Dictionary, 14,401.*]

MONBODDO. I consider the Commissary Court as a relict of popish tyranny. The clergy supposed that they had a right in testaments, and a jurisdiction concerning them : this right of jurisdiction was, by degrees, diminished. It was an excellent law which made confirmation not necessary. We have got into

the simplicity of the Roman law, where possession was all in all. In Lord Stair's time it was not so : for then confirmation was held to be *aditio hæreditatis in mobilibus*. Later decisions have varied this : and we have gone so far in this way that we cannot go back. It has been found, that a partial confirmation is sufficient, and that apprehending possession is sufficient. If I do a deed, acknowledging the succession, I acquire a title to the succession ; but here the difficulty is to find that Alexander did any deed acknowledging his title to the succession of James. His continuing to be debtor was not sufficient : he could not acquire a right without incurring a passive title. His continuing debtor could not be a passive title.

COALSTON. There is no doubt as to the general rule of law, that neither heritage nor moveables could transmit *ipso jure*. This rule is strictly kept up in heritage. As to moveables, confirmation is highly proper, when there is an incumbered succession : but, when there is no incumbrance, confirmation is a great grievance. Since Lord Stair's time there have been great alterations in the law as to confirmation. The first blow given to it was the prohibiting charges to confirm. There have been various decisions upon the same plan. When I collect the whole decisions, they amount to this :—Wherever the person who is in the right of the defunct attains possession, *that* supersedes the necessity of confirmation, so as to exclude the remoter relations. This applies to the present case : the debtor was as much possessed of the sum as if he had levied it from a stranger.

PITFOUR. The first question here is, Whether the sum vested *sola superventia* ? 2. Whether, if it did not vest, it could be extinguished *confusione* ? As to the *first*, I do not think that the law has ever been altered by any of the decisions mentioned. I still think that confirmation is *aditio hæreditatis in mobilibus* now, as much as in Lord Stair's time. The inconveniences of confirmation may be rectified, but confirmation itself ought not to be abolished. Confirmation is salutary : it prevents embezzlement, and provides caution. We have the evidence of Acts of Parliament, and of all lawyers, that confirmation is *aditio hæreditatis in mobilibus*. It is true, that the Committee of Estates, or Convention, at the Revolution, complained of confirmation as a grievance. When the Convention became a Parliament, it removed the grievance, but did not abolish confirmation. See particularly 14th Act of Parliament 1693 and 41st Act Parliament 1695. All our decisions go on the same plan. See *Sinclair* against *Sinclair*, 1726, Lord Kaim; *Boyes* against *Dewar*, 1745, Falconer. If I were to go into the new system of law, my head would turn round. As to the decisions quoted on the contrary, *they* confirm the rule ; *M'Whirter*. Agreeable to what is laid down in heritage, the heir, by that decision, apprehending possession, may possess ; *Mrs Murray*. There a partial confirmation was found necessary,—nothing of that kind here : therefore that decision proves against Alexander Pringle. On the same day, it was found that a decerniture of executor dative was good for nothing without confirmation ; *Carmichael*. If you hold that a man acquires *ignorans et dormiens*, you make a wide stretch indeed.

KENNET. Confirmation is part of our law not abolished : this is admitted on all sides. It is also true, that our law has received some alterations by the Act 1690, and the decisions since that time. The question here is, Whether was the debt extinguished *confusione* ? I think that something was necessary

on the part of Alexander to be *done*; but nothing was done. The bond is still *in hæreditate jacente* of James. (N.B.—A mistake in expression, for there was no bond.) If there was indeed any intromission by Alexander, there might be a difference.

KAIMES. A right, having burdens, cannot be acquired to a man without his consent. Alexander would not perhaps have been liable universally, but he would have been liable to processes. *Confusio* is only a temporary suspension of a debt, not an extinction.

JUSTICE-CLERK. I do not think that there is any difference whether a man has effects in his hands *ex deposito* or *ex commodato*, or whether he directly apprehends them. A confirmation gives the aid of the law *ad colligenda bona*. If you need the aid of the law, you apply for confirmation. An estate is here settled on the eldest son, with the burden of L.1500 to the younger son. By the death of the eldest son, the estate becomes disburdened: this is my idea of the case. If Alexander had left a son, the case would have been the same 39 years hence as at present, and the subject might have been carried off by remote collaterals.

AUCHINLECK. Every thinking man endeavours, in his settlements, to obviate the necessity of confirmation. Wherever there is a special assignation, the supposed security of creditors, by means of confirmation, is at an end; and, formerly, confirmations were the favourites of the law, and the Lords of Session had a share of the profit. When there is possession, there is no occasion for confirmation; because a man ought not to be put to expense merely in order to give it to the commissary. In heritage, possession does not transmit the right; but in moveables it does. Suppose that a valuable moveable, not a sum, had been the subject in question, and Alexander kept it, is not that sufficient? Here L.1500 belonged to James,—he had no debt,—Alexander had the subject,—he saw the decisions of this Court,—he relied on them,—he did not confirm. It is said that there was no *animus* in Alexander; he laid hold of any little moveables that James had: this was *gerens se* as executor.

PRESIDENT. No doubt that confirmation had all the force supposed in this argument. The benignity of the law has softened confirmation, in the same way that the effect of passive titles has been softened. The Act 1690 did not mean to throw loose the goods of the defunct, but to make a way for the nearest in kin. If the word *alteration* displeases, I will say that decisions have introduced relaxations of the law. This is not a question as to a creditor of James; but it is a question as to Alexander having the *instrumentum* in his hands. Possessing for a number of years, it must be supposed that he was willing to keep it. The decisions show the genius of the law. There is no danger of a *damnosa hæreditas*; but, if there was, let Alexander look to that.

On the 1st March 1768, the Lords repelled the defences, and remitted to the Lord Ordinary, altering the interlocutor of Lord Justice-Clerk.

Act. H. Dundas, R. M'Queen. Adv. Campbell, A. Lockhart.

Diss. Justice-Clerk, Auchinleck, Barjarg, Coalston, Ellick, Hailes, President,—7.

Alemore absent. So that the Judges were equally divided, the President having no vote.

N.B. It appears, from the report in the Faculty Collection, that, on 7th March 1769, the Lords altered this interlocutor, and assoilyed the defender. *Vide Dictionary*, 14,401.

1768. March 3. JEAN SCOTT against WILLIAM ELLIOT.

BANKRUPT.

Evidence of Bankruptcy.—Act 1696.

[*Faculty Collection*, 306 ; *Dictionary*, 1108.]

PITFOUR. 9th January 1751, *Johnston* against *Home of Manderstoun*. The law does not prevent a man from selling his lands or his moveables. I would put the judgment upon this, and so avoid giving any judgment upon the other point, though I think that the judgment of this Court, in the case of *Erskine of Kirbuddo*, was right, and that of the House of Peers wrong.

KENNET. If a creditor has an heritable bond, and delays executing the precept, the law holds the infestment, when taken, to be a partial preference.

AUCHINLECK. The Act of Parliament does not strike against an original contraction with a warrant for infestment.

PITFOUR. If the bond had been granted within sixty days of the bankruptcy, it would have been good. Can it be worse because dated two years before the bankruptcy?

COALSTON. The first question is doubtful, by reason of the decision of the House of Lords. As to the second, the Act of Parliament does not strike at *nova debita*; but my doubt is here: If one, in doubtful circumstances, grants a bond, and the creditor takes no infestment, till the debtor is just retiring to the Abbey, I have some doubt how far this is not reducible as fraudulent.

MONBODDO. The Act 1696 is a supplement to the Act 1621. The Act 1696 made any security to a former creditor to be reducible; but it does not extend to *nova debita*. As to the delay of taking infestment, that does not move me. The taking infestment at any time, does not vary the case. I cannot divide the date of the bond.

KAIMES. I will allow, that, if money is lent, and a long time intervenes before infestment, a proof of a fraudulent connivance might be admitted; but this does not apply to the present case.

“The Lord Hailes, Ordinary, found, That, although the principal debtor be proved to have been in the custody of a messenger, in virtue of letters of caption, *this*, joined with insolvency, is not sufficient to constitute him a bankrupt, in terms of the statute 1696.”

On the 3d March 1768, the Lords, in respect that the debts were *nova debita*, repelled the objection upon the Act 1696, and found it unnecessary to determine the point determined in the interlocutor.

Act. A. Crosbie. Alt. A. Wight.

1768. March 3. WILLIAM HARDIE *against* ANDREW BLACK.

DILIGENCE—PERICULUM.

Fire, occasioned by the negligence of the Tenant, subjects him in damages to the Proprietor.

[*Faculty Collection*, IV. p. 305 ; *Dictionary*, 10,133.]

HAILES. This question is to be determined upon the *species facti*. Black, and his partner Clark, must be considered as one. Clark was told, by the person employed to erect the comb-pot, that the method proposed was insufficient and dangerous ; yet he persisted in having it erected in that method : the consequence was, that the house took fire. *Who* ought to pay the damage ? He who, by his obstinacy in a matter relating to his own art, occasioned it. This does not imply that the lessee is liable for any damage occasioned by his own negligence, and much less by the negligence of his servants. If a colour-man should be tenant in a house, and the house should be burnt by the accidental boiling over of an oil pot, he would not be liable in the damage ; but, if the colour-man should fill the oil pot up to the brim, and then set it on the fire, and leave it to boil over and burn the house, although he ought to have known the consequence, and although he was warned of the consequence, then he would be liable in the damage ; because he ought to have known, and was forewarned of the danger. The same is the case here ; and, by finding Black liable in damages, we will not introduce an inequitable or dangerous precedent.

MONBODDO. I am of the same opinion, and upon the principles just now delivered. Negligence of servants is not enough to make a master liable. But here there is more—a neglect in an artist. Hardie, the lessor, did not know the danger attending the trade of wool-combing. Black did : And yet he neglected to take the plain and necessary precautions.

COALSTON. I doubt as to Hardie's knowing the purpose of the lease, or the danger of wool-combing. But he *allowed* the comb-pot to be erected. *This* brings the case to the general point. In order to subject a man to so deep consequences, I would require strong proof. If the *conductor* is guilty of supine negligence, he must be liable for the whole damages ; but the case is different where the negligence is less. The English Act of Parliament quoted, is a reasonable one. The comb-pot might have been constructed in a better form, but still that better form was not altogether safe. Black did not all that he might have done ; but still, had he done more, there would have been a risk. In this case the fire was occasioned by the fault of the servant, in covering the fire without extinguishing it.

PITFOUR. *Here* are two questions ; one of law, one of fact. I do not think that *levissima culpa est præstanda* in the case of fire, so as to subject a man to the negligence of servants. Every man will, for his own sake, take care of his

own house, his goods, his life : *Res quæcunque perit suo domino* is a general rule. As to the fact, I do not see any gross fault on the part of Black.

AUCHINLECK. Suppose that only the floor had been damaged, instead of the room being burnt, would not Black have been liable? Had that been the case, his defence would have been as good as it is now, and yet it would not have been listened to. Hardie might have stopt the work. Any neighbour might have stopt it as a nuisance. Black then was doing an illegal thing. He ought to have been upon his guard in erecting the comb-pot. A certain thickness of clay was necessary for preventing the fire from going through to the wood floor, but this was obstinately neglected.

KENNET. The construction of the comb-pot was improper. The defender knew this, and yet would not have it obviated.

KAIMES. When a man does a wrong wilfully, he is liable for all consequences; but when from a *culpa*, he is no further liable than as to direct consequences. In the case of *Sir Ludovick Grant* and *Robertson*, where there was no *dolus*, only direct damage was found due. I am relieved by this consideration. In *locatio conductio*, a man must use the house let as if it was his own. Black would have done just as he did, if the house had been his own. Here the work stood a month, and no harm was done, so that the fire must have happened through the carelessness of servants. A master is liable for the carelessness of servants in the *negotium* where he employs them. If I am liable myself, I must be liable for him whom I employ.

GARDENSTON. This is a hard case on either side. I am not alarmed with the consequences. In this case the single question is, Where a damage by fire has arisen from the fault of a man professing a trade, and that too of one who was forewarned.

On the 3d March 1768, the Lords "found the defender liable in damages," and ordained an account to be given in; which they modified.

Act. D. Armstrong. *Alt.* A. Wight.

Diss. Coalston, Pitfour, Elliock.

1768. March 5. LIEUTENANT JAMES GRIERSON *against* CATHERINE CAMPBELL and OTHERS.

PRISONER.

An Officer of the Navy is not obliged to assign his half-pay on a *cessio bonorum*.

[*Faculty Collection*, IV. p. 130; *Dictionary*, 11,784.]

PITFOUR. I cannot understand the clause so strictly as to imply only *misfortunes* by fire, water, and the like. It means *all misfortunes* to which we are subject in common life. The half-pay is not the debtor's; it is for a particular purpose, like wages to a servant for service and clothes.

HAILES. The half-pay is not a subject affectable by creditors. How can the debtor assign it? To whom is the assignation to be intimated? Arrears of pay, or even of half-pay, may possibly be assigned, but half-pay in time to come cannot.

On the 5th March 1768, the Lords found the pursuer entitled to the *cessio*, and dispensed with the habit.

Act. G. Buchan. *Alt.* G. Ferguson.

1768. June 21. THOMAS SMITH *against* THOMAS HAMILTON of Falla.

TACK.

An Heritor may search for Coal, notwithstanding the lands were let without any reservation to that effect.

[*Faculty Collection*, IV. p. 307 ; *Dictionary*, 15,266.]

MONBODDO. If the proprietor has a right to work coal, he need not reserve it. There is nothing in the several reservations which was not *ab ante* implied ; *quæ dubitationis tollendæ causa contractibus inseruntur jure communi non derogant*. Were it otherwise, writers of deeds would have the making of the law, by their inserting clauses wherever they are pleased to think there is any ambiguity in the law.

BARJARG. Where the damage done by working coal is incompatible with the use of the farm, the proprietor is not at liberty to work coal.

JUSTICE-CLERK. This is a point of great consequence. Mines must remain with the landholder. If not leased, the reservation is implied. When a probability of working coal occurs, parties will make a special reservation ; but very often mines and quarries cast up, of which the parties, when entering into the lease, had no suspicion. It is admitted, that in a large farm the landholder may work the coal. Why not in smaller? We cannot draw the line. The law secures the interest of the tenant by providing an adequate recompense for the damage occasioned by working the mines and quarries.

GARDENSTON. If the proprietor has right to the coal, he must have access to it.

COALSTON. The tenant has right to the surface ; the proprietor to every thing besides the surface. Coal, lime, minerals are all under one rule. In the case of the *Commonty of Riddingwood*, the Duke of Hamilton was found to have right to the whole coal, although the commonty itself was subject to division.

PRESIDENT. *Unusquisque rei suæ moderator ac arbiter*. Landholders may give up their right ; and, by the general practice, there are reservations deliberately made. The case of *Colquhoun*, mentioned by Stair, does not come up to this

case. When a man limits his own property, he cannot deprive the superfiary of his right. Damages will not do. If the master has neglected to reserve his right, he must blame himself for the consequences.

AUCHINLECK. This case is difficult and new. When a man feus out lands with the privilege of pasturing upon a common, the right of property remains with him, and he may set down pits for stone, coal, or other minerals. Most feus were originally no more than grants to those already tenants. Can the proprietor's right be less in leases than in feus? Will you debar him during a temporary right, while he is not debarred during a perpetual right.

On the 21st June 1768, the Lords found the heritor has right to search and put down sinks for coal in the lands set in tack, upon satisfying the tenant for the damage which may be thereby incurred. Adhering to the interlocutor of Lord Pitfour.

Act. D. Rae. *Alt.* R. Blair.

Diss. Alemore, Barjarg, President.

1768. June 30. MRS MARY KELSO *against* WILLIAM and GEORGE BOYDS.

PROPERTY.

A Superior Heritor must not, by extending a rivulet over his ground, divert it from returning to its course.

[*Faculty Collection*, IV. p. 307; *Dict.* 12,807.]

AUCHINLECK. A perennial burn cannot be diverted by the superior heritor so as to be prevented from descending to the inferior heritor. *Here*, the superior heritor sets aside the burn for ever.

MONBODDO. The Roman law furnishes us with principles for determining this case. The doctrine of *aqua pluvia* is not to the purpose; for the question here is concerning a *flumen*, not a torrent, but perennial by the Roman law. *Flumen publicum* is not a navigable river, but any streams *usus publici*, whereof a navigable river is composed. To such the Prætor's edict applies, *uti priore æstate*, &c. The right of the inferior tenement is not a servitude, but it is a right owing to the nature of the subject. The superior heritor may use the water even for fructifying his ground, but he must use it so that the water return to its channel. We cannot force parties to use the water *alternis vicibus*, though that may be convenient for both parties.

KENNET. I think the superior heritor may divert the water for a time. *Alternis vicibus* is a good rule, and pointed at by the Ordinary. Kelso cannot appropriate it for a season more than Boyd can.

AUCHINLECK. There is no declarator on Boyd's part, as to his tenement in-

ferior to Kelso's. Besides, Kelso does not seek to divert the burn at all, being satisfied with its overflowings.

ALEMORE. This is not a fountain rising in Boyd's ground, but a rivulet running through different grounds. Every one may use it. None can divert it.

PRESIDENT. I am of Lord Alemore's opinion. I do not, however, say that, if a spring arose in a man's ground, he might not divert it; though, if he did not divert it, the consequence would be, that it might join below with other springs.

On the 30th June 1768, the Lords found, in substance, that the superior heritor could not divert the burn so as to prevent its returning into the channel for the behoof of the inferior heritor; adhering to the interlocutor of Lord Coalston.

Act. D. Rae. Alt. R. M'Queen.

1768. July 13. JOHN RANDAL *against* ALEXANDER and GEORGE INNES.

TRIENNIAL PRESCRIPTION

Takes place on Debts contracted by a Scotsman in England, if claimed in Scotland.

[*Faculty Collection, IV. 310; Dictionary, 4520.*]

MONBODDO. The decisions and authorities are so opposite that I do not know what to make of them. I despair of seeing our law determined by decisions. Here we must resort, as I would always wish to do, to principles and the authorities of the best lawyers. [All this is contradictory. It amounts to this, that a decision upon principles is a decision upon his principles, and that the best lawyers are *they* who support his opinion.] With respect to the constitution of obligations, the law of the country where the contract is entered into, must be the rule. A debt contracted after the English manner, may in this country be extinguished in the same way. This rule will go to prescription, which is presumptive payment. If the parties had continued in England during the six years, and no demand had been made by the creditor, if afterwards the debtor had come to Scotland, there could be no demand. If, on the other hand, prescription were not run by the law of England, when the debtor left the country, the creditor would be entitled to payment in Scotland. A man cannot be freed from his debt by leaving the country, and settling in Scotland. But when a man settles in Scotland, the Scottish prescription must be the rule. After he settles in Scotland, the debt will prescribe by the law of Scotland in three years. This is agreeable to the last and best decision,—that in the case of M'Neil.

GARDENSTON. Of the same opinion. If the rule is not to be according to the law of this country, there can be no limitation at all.

COALSTON. No statute has any authority beyond the territory where it is

made ; but still the great ends of justice cannot be attained without adopting the regulations of other countries in particular cases. All voluntary acts, done in a foreign country, must be tried and determined according to the law of that country. The present question is, How far can the statute of limitations be founded on *here* ? If the debtor has resided in England, and, by his residence for six years, has obtained a liberation, he will not again be subjected to the debt when he comes to Scotland ; but if he comes to Scotland before the six years are expired, and remains there unchallenged for three years, he is free, upon the principles of the law of the country where he resides.

AUCHINLECK. The great end of judging is to do justice. Prescription is a very proper political institution to quiet the minds of the people ; but it is dangerous to say that, in all cases, we must determine upon prescription by the law of Scotland. If a debt prescribes in six years by the law of England, it would be hard to make it subsist for 40 years, merely on account of the debtor coming to Scotland. On the other hand, if a man who is liable in a debt, which would not prescribe in less than 40 years by the law of Scotland, should go into England, it would be hard to make that debt subsist but for six years. It is objected that there will be inconveniences in subjecting one coming into Scotland to the clauses of Queen Anne's Act of limitation, for, that thereby the ground of action might subsist for ever. I answer, that, as in the case of bills, which do not prescribe before the lapse of 40 years, action is denied, if they lie ever long without cause shown ; so action would be denied in this case. And, on the other hand, as in bills, action will be allowed, when a cause of silence is shown : So also, in this case, action will be allowed.

PITFOUR. The Scots prescription ought to be sustained in all cases. We know no other prescription but our own. The statute of limitations may be urged as an argument for affording a presumption of payment, but it cannot be urged as an authority in law. It may be objected, that a man may be induced to leave England where he is liable in a debt, and come to Scotland, where he will be free by the triennial prescription : I answer, that it is not conclusive to argue from a case which will very rarely happen. Few debtors will choose to change their domicile in order to avoid a single debt : Be this as it will, we must not alter the law on account of contingent inconveniences. If the judges of every country determine according to the prescription established in their own law, every debt will prescribe, unless there be a country where there is no law of prescription at all. In matters of form, the law of the country where the contract is entered into, may be followed, because, as to form, people are obliged to follow the only rules that are known to everybody ; and, in a question of form, everybody knows what the rule is, so that there can never be any difficulty of coming to the knowledge of it. But we cannot judge upon the principles of any foreign law, especially of the law of England. It is inscrutable : we get precedents in abundance, but we do not get all precedents : we have but partial views of that law presented to us. Whenever we judge by the law of England, we judge wrong : the fault is not in judging wrong, but in pretending to judge at all where we are ignorant.

PRESIDENT. The judge who spoke last has treated his predecessors with great freedom. If the law of England is so inscrutable, how comes he to be so

well acquainted with it, and so able to point out the errors of the judgments of the Court of Session in matters of that law? I do not entertain the apprehensions that he does. In cases of necessity the law of England may be resorted to. I have been early taught that foreign law is fact, and, like all other facts, the knowledge of it may be attained. It is nothing that English lawyers and English judges differ in opinion, as the lawyers and judges of all countries do: We ourselves daily differ as to the principles of the law of Scotland; and there is no remedy. If a plea is made, that an obligation is extinguished by the *lex loci* where the obligation was entered into, we must inquire *what* is that *lex loci*, and so determine. If we should find that the statute of limitation does not take place in Scotland, still it may be good in England, and the debtor returning thither might be tried according to the English law. Here there is a defence pleaded upon the law of Scotland, not an extinction of the debt by the law of England; and the defence seems, *hoc statu*, good.

HAILES. I have still a difficulty arising from the situation of the parties. The royal regiment of artillery is in a singular situation; it is a *stationary* regiment, having always its colours and its head-quarters at Woolwich. An English tailor contracts with an officer of that regiment: supposing him to have a fixed domicile, he knows that his contract will not prescribe in less than six years; and, if his debtor leaves England, he supposes that the prescription will not continue to run: the debtor is ordered across the Tweed, upon detachment, by his commanding officer: he does not mean to evade his creditor, he only obeys his commanding officer: he dies in Scotland. And thus his debt will be annulled without any intention on his part, and without it being in the power of his creditor to prevent it. What I mention relates to that part of the account which was furnished in England; for, as to what was furnished in Scotland, I have no difficulty: it must prescribe according to our law.

JUSTICE-CLERK. I consider the prescription of the country where the obligation is entered into as one of the modes of extinguishing an obligation. But when a person comes into this country *animo remanendi*, while a ground of action subsists against him, I know of no law by which we can determine upon that action, but our own law.

KENNET. This cause is to be determined by the prescription of the Scots law. This is agreeable to the opinion of Huber Sande. I think this must be the case even as to the debt contracted in England, for there is no particular place of payment stipulated; and, therefore, the *locus solutionis* must regulate the payment, that is, Scotland, where the debtor resided.

On the 13th July 1768, the Lords sustained the defence of the triennial prescription (without a vote.)

Act. A. Wight. Alt. Cosmo Gordon.

Reporter, Auchinleck.

1768. July 13. MESSRS. PEWTRESS and ROBERTS *against* THOMAS THOROLD, and OTHERS.

FOREIGN—ARRESTMENT.

Arresters preferred to assignees under a commission of bankruptcy, upon funds which had become the subject of competition before the arrestments.

[*Faculty Collection, IV. p. 315 ; Dictionary, 756.*]

MONBODDO. It is not necessary to determine what right the legal assignees have, by the former interlocutor of the Court. The draught upon *Cumming* was like an assignation to a conditional debt. That a conditional debt may be arrested, was found in the case between *Sir Harry Innes* and *Ludovic Gordon*, 1740 : I remember that *Arniston* *there* gave his opinion to that effect. The same thing was again found in 1742, in the case of *J. and R. Robertsons of Glasgow* ; and there is a decision in the Dictionary which imports that an arrestment of a widow's jointure, *currente termino*, is good ; though, if the widow were to die before the term, nothing would be due to her ; and, consequently, the debt was nothing more than conditional.

COALSTON. I doubt as to the first point. An order is equivalent to an assignation ; but I doubt how far an assignation in general will carry bills that are in my hand for the behoof of the common debtor. A conditional debt may be carried by assignation ; but then the debt must be due by the person in whose hands the arrestment is used. The legal assignation under the commission of bankruptcy, could not carry *nomina debitorum* due by debtors living in Sootland. As to the judgment of the Court, finding that the assignees might *appear and compete* at that period, the Court went far in establishing the English bankrupt law. The interlocutor must be taken altogether. The same interlocutor preferred certain arresters ; and, therefore, the only thing found was, that the assignees, under the commission of bankruptcy, had a title to demand payment, if no one interfered.

KENNET. The assignees have a right to compete, but still other creditors may attach the subjects. I do not think that the drawing of bills was equal to an assignation ; because, at that time, *Cumming* had nothing in his hands. The assignees are preferable upon the second ground, because they produced their commission in *Cumming's* multiplepoinding. This production was prior to the arrestments, and equal to a judicial intimation.

AUCHINLECK. The former interlocutor determines what effect the assignation, under the commission of bankruptcy, should not have ; but it leaves uncertain what effect it should have. As we now consider this assignation to be no more than a step of English diligence, we may possibly now find that they have no right at all *here*. We have found in this particular case that they may *compear and compete*. The assignees have got a commission from the courts in England,

but they have not followed it out. In order to carry by arrestment, there must be a debt. Mr Cumming has now recovered the money: the assignees have done nothing to attach it. Messrs. Pewtress and Robarts have attached it; and, therefore, they, as arresters, ought to be preferred to the legal assignees.

ALEMORE. The former interlocutor certainly found that the legal assignees had a right to draw where there was no competition; but, if it be held to have found no more, it was elusory. The commission was found to give them no preference to prior diligence: but, after their right was produced, there could be nothing done to impair their right. The bills granted to Pewtress and Robarts were not equivalent to an assignation, because there was no debt due by Cumming. According to the course of business, Cumming was not bound to accept. A second draught, in favour of another person, after the money came into Cumming's hands, would have been answered, and would have been effectual. The second arrestment is not good against the assignees, who were lulled asleep by the interlocutor of the Court finding that they had a right to compear and to compete.

KAIMES. When a man conveys a subject by assignation, this, as an act of his will, is good over the whole earth; but a court can convey nothing that is not within their jurisdiction. The legal assignation to the trustees conveys English effects, but nothing in Scotland. The assignees have a title to pursue; but they have no *jus* or *nerus* in the subjects. The intimation to Cumming, when he had no money in his hands, signifies nothing; but the posterior arrestments, when he had money in his hands, are regular: this diligence is to be preferred to the assignee's simple power of appearing. I give my public opinion so; but my private opinion is otherwise.

PRESIDENT. The case of *Balgair* and this case were determined at the same time. In the case of *Balgair*, a certificate of the surrender in England was held to be a discharge of the debt. This shows, that, at that time, great authority was given to the English commissions of bankruptcy. The interlocutor in the present case was pronounced upon the same principles: it meant that the assignees had more than a simple power of appearing: it implied that posterior arrestments were barred.

JUSTICE-CLERK. I incline to give effect to the bills drawn upon Cumming. Cumming ought to have accepted *qualificate*. He became trustee for the holder of the bills as soon as they were presented to him, in a competition with Tabor and Company, the drawers of the bills, or with their assignees.

ELLIOCK. I consider the legal assignation to be nothing more than an assignation by the bankrupt himself. An assignation by the bankrupt himself to trustees, for the behoof of all his creditors, will not preclude the diligence of others. Why should the legal assignation do more?

PITFOUR. Cumming might have paid the money if he had pleased; but he was not bound to pay it. What is the import of the interlocutor? It was objected, that the assignation, being a creature of the law of England, could carry nothing: the assignees were found entitled to compear; that is, they were found to have as good a title to the debts as if all the creditors had come in and assigned. The rest of the interlocutor shows, that their right was nothing more; for, by it, the arresters were preferred.

On the 13th July 1768, the Lords preferred the arresters to the assignees. [The interlocutor was general; but it would seem that the majority of the Court went, upon this, that the legal assignees had not followed furth their right.]

On the 22d November 1768, the Lords adhered.

Act. H. Dundas. *Alt.* R. M'Queen. *Reporter*, Pitfour.

Diss. Alemore, Kennet, Hailes, President.

1768. July 14. CAPTAIN WILLIAM LIVINGSTON *against* JAMES WARROCH.

JUS TERTII.

Neither party can plead on a Defect in the Right of the Common Author.

(*Faculty Collection*, IV. p. 313; *Dictionary*, 7847.)

COALSTON. Both parties derive right from Lady Callendar. Neither of them can object to the author's right. Had the objection been made by the heirs-male, it would have been good; but then the defence of prescription would have been as good. The party here cannot plead in the right of the heir-male without being liable to the same defence as he would have been. If the defender may object to Lady Callendar's right, by parity of reason he may object to a progress of 1000 years.

MONBODDO. If a person is in the course of usucapion, he may maintain his right against every one who is not *verus dominus*: it is therefore material to inquire into the right of Sir James Livingston and Lady Newton. If the fact is true, that the lands are not in the charter of adjudication, then the pursuer has not proved that he is the *verus dominus*, and the subject is still *in hæreditate jacente* of James Livingston.

AUCHINLECK. It is not competent for the defender to say, that James Livingston had no right himself, and therefore could not sell to me. How can he dispute the right of the person from whom he himself derives right?

PRESIDENT. I always understood it to be a fixed principle, that no one can object to his author's right.

On the 14th July the Lords found, That it is not competent for the defender, who derives right from James Livingston, heir of tailie to the Countess of Callendar, to challenge the Countess's right, upon which his own depends; and remitted to the Ordinary to proceed accordingly.

Act. R. M'Queen. *Alt.* A. Lockhart. *Reporter*, Pitfour.

Diss. Monboddo.

1768. July 14. ARCHIBALD SINCLAIR *against* MRS JEAN MENZIES.

FOREIGN.

A foreign decree, bearing to have been *in foro contentioso*, has neither the effect of a *res judicata* in Scotland, nor does it entitle the claimant under it to throw the *onus probandi* on his adversary.

[*Faculty Collection, IV. p. 384 ; Dictionary, 4542.*]

COALSTON. I doubt as to this being a decret in absence by the law of England. Here there is a procurator appearing in the cause, and a remit to auditors named by the parties: nay, it is more than a remit, it looks like a judicial reference; and, from the accounts, it appears that vouchers were produced. When a decret is pronounced in a foreign country, after appearance of parties, execution will follow upon it in this country, unless it can be shown to be contrary to the law of the country where it was pronounced.

MONBODDO. This is not a decree in absence, for the sum obtained by the judgment is much less than the sum acclaimed. Here there was a remit to auditors: one of them was named by the defender's attorney. The pursuer was not Mrs Menzies's attorney at the time. In support of such a decree, we have the authority of civil law, of the Doctors, and even of the English law, where there is less *comitas* than in any part of the world. There is also the authority of this Court in the case of *Edwards against Prescott*. Parties residing in a foreign country must submit to the law of that country, and a decret obtained there must be held good, unless it be shown that it was manifestly iniquitous or informal.

ALEMORE. When a jury finds a fact, the fact is understood to be so as found; but here there is nothing found by a jury: there is only a report by auditors. We must have some *vidimus* that the judgment proceeding on that report is agreeable to justice and equity, when the justice and equity of it are controverted.

AUCHINLECK. If this were a decret in absence, or a decret *in foro* upon little litigation, we might be willing to look into the decret. But here is a decret upon a long account, whereof the people in Jamaica could judge better than we can. If there had been no compearance, there might have been a suspicion. But here there was a compearance, and also a proper remit.

PRESIDENT. This Court is not merely executorial. Any objection, either in law or equity, may be proved. The mere production of a decree, without vouchers, is not enough. It is suspicious that the pursuer might have had execution in Jamaica, and yet he brings his action here. We must have a *vidimus*; less indeed than if the cause had come here originally, but still we must have some evidence of the justice of the decree.

HAILES. This is a singular case. A Jamaica factor is supposed to have super-expended; and, instead of being pursued to account, pursues for a balance.

I doubt much of this decret being *in foro* ; if it was, it is odd that the defender should never have had any demand made for payment of charges. An attorney in Jamaica would not, I presume, serve for nothing. The auditors are supposed to have taken much trouble in examining the accounts. They would expect payment for their trouble, and yet such payment is never demanded from the defender. It was an easy matter to mark the appearance of this unknown attorney, Gabriel Jones. What is it that we can learn from the decree, but that the auditors struck a balance? They say this will appear *more fully from the account*, and yet the account does no more than strike a balance. When we have a decree, which was probably in absence, upon evidence which proves nothing, and which is excepted against, we cannot give so much authority to the decree as to make it a *probatio probata*, and exclude that investigation which the Ordinary has appointed. The case of *Clark and Laycock* does not apply at all; for *there* Clark, a Scotsman, brought an action in England against an Englishman. He failed in his action by the judgment of a jury. Instead of bringing this judgment under review in England, which it was proved he might have done, he sat with his arms across. And when Laycock pursued him in Scotland for payment of expenses, awarded in consequence of the verdict of the jury, he objected iniquity, which he could not prove from the verdict, and of which he might have availed himself in England notwithstanding the verdict.

KAIMES. The great point is, Whether was the attorney properly instructed? We are not bound to execute foreign decrees, but still there is a *comitas* due in judging upon foreign decrees. The decree must be of such a complexion as that we may *know* from it whether it is just or otherwise. Were the rule different, that decree, which had the least evidence, would be the best, because such decree could not be checked. I do not see that any vouchers were produced.

BARJARG. We must hold a foreign decree to be good, until the contrary is proved. The defender does not object any thing particular to the account. She does not deny the pursuer's management nor his remittances.

GARDENSTON. How easy will it be for a Jamaica factor to get an attorney to appear for him, and to defend *against* him, as in this cause. By means like these, a Jamaica factor may gain an estate in this country, instead of accounting for an estate in Jamaica.

KENNET. The presumption lies for a decret *in foro* : still the pursuer must produce vouchers, and deliver them up. If no vouchers are produced, how can the defender show that the decret is unjust.

On the 14th July 1768, the Lords ordained the pursuer to produce the vouchers of the articles stated in the decree, and judgment in the Supreme Court of Jamaica libelled on; adhering to Lord Pitfour's interlocutor.

Act. A. Bruce. *Alt.* A. Lockhart.

Diss. Auchinleck, Barjarg, Coalston, Monboddo.

[Reversed upon appeal.]

1768. July 27. HAIG, DAES, and COMPANY *against* JOHN CAMPBELL, Writer in Stirling.

JURISDICTION.

Inferior Admirals have no jurisdiction in Mercantile Causes.

[*Fac. Coll. IV. 317 ; Dictionary, 7517.*]

PITFOUR. The Act 1681 relates to the prorogating jurisdiction in *maritime* causes. *Mercantile* remain upon the ancient footing. *There* the jurisdiction may be prorogated ; but I doubt whether the Admiral may pronounce decreet in absence when the party does not appear. Thus, in a like case, *Captain Lewis Grant* against *The Creditors of Drumakill*, 1739, decreet was allowed in this Court. In like manner, by Act of Sederunt, the commissaries were prohibited from giving decreets in absence for above L.40 Scots.

COALSTON. I am of the same opinion as to the meaning of the Act 1681 ; but, if the Admiral has a cumulative jurisdiction, what necessity of a prorogation ?

[At the second hearing :]—I am now satisfied that, before the Act 1681, the Admiral had a jurisdiction solely in *maritime* causes. There is a decision in *Balfour* which finds that the inhabitants of boroughs ought to be pursued before their magistrates, not before the Admiral.

AUCHINLECK. The Admiral Court was none of the original courts in this nation. It related to matters concerning shipping. Any thing more was an encroachment. The High Court of Admiralty has been in use to judge, *of consent*, in matters mercantile ; but the deputies carry the matter further. At this rate there may be Admirals in every village.

MONBODDO. There is no evidence of the practice of the Admiral to pronounce decreets in mercantile causes, when his jurisdiction is not prorogated.

KENNET. In the case of *Thompson and Tabor*, admiral-precepts in mercantile causes were held good. If the Admiral had no jurisdiction unless prorogated, these diligences would have been void ; for there could not, in the nature of the thing, be any prorogation.

PRESIDENT. I would sustain the defence in this case, where the depute-admiral is alone concerned. I would not establish supernumerary courts of justice in every corner of the country.

On the 16th June 1768, the Lords “sustained the defence, and found expenses due.”

On the 27th July 1768, having advised a petition and answers, “they adhered.”

Act. A. Crosbie. *Alt.* D. Armstrong. *Rep.* Auchinleck. As to expenses, *Diss.* Coalston, Pitfour, Monboddo.

1768. July 27. WILLIAM RALSTON *against* GAVIN PETTICREW.

PROPERTY.

One must not use one's Property so as to destroy any thing belonging to a Neighbour.

[*Faculty Collection, IV. p. 141 ; Dictionary, 12,808.*]

MONBODDO. *Nemo potest immittere in alienum* ; but, if there is no servitude, one may build upon his own ground, though to the manifest prejudice of his neighbour. The question here is, Whether is the pursuer hurt ? From the proof, I must conclude that he is.

PITFOUR. I always thought that the rule of the civil law was right ; and it is as just now laid down.

ALEMORE. As to immitting smoke, there is no help for it ; but here a real damage is done.

HAILES. The case *Fraser against Dewar*, mentioned by the defender, does not apply ; for *there* the limekiln was built *in prædio rustico*. And, besides, Dewar proved that there was no place upon his ground where the limekiln could be built, unless that where it was built. So that the work was not only free from the exception of being done *in æmulationem*, but appeared to be erected from necessity ; and Dewar had no choice but either to erect his limekiln where he did, or relinquish his undertaking altogether.

COALSTON. When I send into my neighbour's ground any thing that hurts the health of the inhabitants, or the cattle, or the vegetables, then it must be stopped.

AUCHINLECK. There is a place for every thing. Noisome works ought not to be erected in such a way as to be hurtful to the neighbourhood. Many things may be nuisances in and near towns, which are not so in the country.

On the 27th July 1768, the Lords, in respect of the real damage occasioned to Ralston, found that the brick-kilns must be removed, altering Lord Gardenson's interlocutor.

On the 25th November 1768, they adhered.

Act. A. Lockhart. Alt. A. Crosbie.

1768. August 4. MRS FLORENCE M'LEOD *against* MR JOHN NICOLSON.

[*Faculty Collection, IV. p. 138 ; Dictionary, 14,946.*]

PERSONAL AND TRANSMISSIBLE—SUCCESSION.

An Annuity, assigned to a Husband in a contract of marriage, transmits to his Heirs, though Heirs are not mentioned.

MONBODDO. The question is, Whether is this a *personale pactum*, limited to

the husband? The determination of this must depend upon circumstances. I think that it is personal to the husband. It is extraordinary that a woman should, at her second marriage, renounce what she had by her first marriage. The word *heirs* seems omitted *dedita opera*, in this clause; for it is inserted in the other clauses. The wife does not absolutely give up her liferent: *qui providet sibi, providet et hæredibus*, is a rule in law; because, in ordinary cases, there is no rule to the contrary.

GARDENSTON. When a man, for an onerous cause, purchases an annuity, what does he purchase? All that the seller has to give. Here the husband is *surrogated* in the full right of the wife.

COALSTON. It is dangerous to depart from general principles: *qui providet sibi, providet et hæredibus*, is a maxim that takes place in all onerous assignations. If this assignation had been granted to a stranger, it would have been good to his heirs: it can make no difference, as to the import of the words, that the assignation is to the husband. The question is, Whether there be any thing special here, to induce us to depart from the legal meaning of the words? There is nothing unnatural for a wife to give up her former jointure where she gets an equivalent. I think that the marriage-contract is rational; that its words are clear; and that the annuity is expressly conveyed.

KENNET. Had the heirs of the husband, and the children of the wife been the same, there would have been nothing unnatural in the provision, as claimed for the husband; but there was an heir of a former marriage. The rule of law does not relate to annuities. I think that the word *heir* was omitted intentionally, and that the provision does not go to *heirs*.

PITFOUR. The chief question is what is rational. I incline to think that the liferent was limited to the life of the husband: it is not customary to give to a husband, after his death, an alimentary provision settled on his wife. Here there was an alimentary provision by the first marriage-contract, and that a very small one. The wife gets less by the second: I never heard of a second contract of marriage, by which a lady was to be a loser. I would require strong words to prove this. We must interpolate an additional sentence in order to divest a wife of a small alimentary provision; and this, by the construction of a Latin sentence, which neither party ever heard of, *qui providet*, &c. Had this been meant, the parties must have been knaves or fools. We must not presume folly or knavery.

KAIMES. The woman's whole substance was 150 merks *per annum*. By her second marriage-contract, she is provided to certain subjects which are better than her 150 merks. There is a difference between a conveyance and an obligation: In the former, heirs succeed, though not named; in the latter, they succeed only when named.

AUCHINLECK. It appears, from the marriage-contract, that the wife was denuded; for she has disposed to her husband, substituting him: after this, how shall we bring back the sum from the husband? All that the wife got by her first contract, was 150 merks *per annum*; she could not expect to rise in her price upon a second marriage. It was not unreasonable to give down 50 merks *per annum* for a husband, and a suitable provision. Her plea is, that, as she had two husbands, she must have two jointures. Had she got a sum of money

from her first husband, it would naturally have gone to the second and his heirs. Is it then unnatural to suppose that she would settle her first jointure upon him and his heirs? The woman had probably something to bring to her first husband. She took an equivalent. At her second marriage, she gave up that, and took what she considered as equivalent; and so it has turned out, for she has got a third husband. If nothing was meant to be given but a liferent during the marriage, nothing was given at all, for the husband would have had that without any contract.

ALEMORE. I have heard a good deal of negotiations between the husband and the wife, of which I see no evidence. I judge by the deed. I think the woman made a good bargain to prevent *questiones voluntatis*, which are exceedingly arbitrary. I judge by the words of the deed: they are express and full. There was no occasion for mentioning heirs: many deeds go in favour of heirs, although not expressed.

PRESIDENT. A simple right of liferent is not to be measured by the rules of succession in lands. Why should I imply heirs when not expressed? There is no equity to exclude the woman from her former jointure. Upon the whole of the case, I think that the provision does not go to the husband's heirs.

JUSTICE-CLERK. Nothing but the clear will of parties can lead me to put a construction upon a clause, contrary to the common course of things; and I do not see any such clear will in this case.

"On the 28th January 1768, the Lords found, that the annuity in question returns to the pursuer, and does not descend to her deceased husband's heirs."

On the 1st July 1768, they found that the assignation in the contract of marriage did carry, not only the annuity which fell due during the marriage, but also the annuities which were to fall due thereafter, during the life of the pursuer." And, on the 4th August 1768, they adhered.

Act. B. W. M'Leod, D. Rae. Alt. A Elphinston, Ilay Campbell. Reporter, Cgalston.

Diss. Strichen, Justice-Clerk, Pitfour, Kennet, Monboddo, President.

Non liquet, Elliock.

1768. August 5. MESSRS LAWSON, JARDINE, and COMPANY, against ANDREW THOMPSON, Tacksman of the Meal-market at Dumfries.

BURGH ROYAL.

A Duty granted upon what sold in the Market-place, not to be eluded by selling elsewhere.

[*Faculty Collection, IV. p. 145; Dictionary, 1965.*]

AUCHINLECK. This duty has been immemorially exacted, and with good

reason. It is like the case of the toll at the *Bridge of Glasgow*, which is exigible, although there is at certain times no passage by the bridge.

PITFOUR. When a duty is granted on markets, the levying of it is not confined to the market-place, nor to the market days. Every part of the town is the market-place, when meal is sold in every part.

On the 5th August 1768, the Lords repelled the reasons of reduction.

Act. A. Crosbie. Alt. R. M'Queen. Reporter, Coalston.

1768. August 5. DUKE of BUCCLEUGH against The OFFICERS of STATE.

PREScription.

An erroneous Tenure of Lands becomes good by Prescription, though the vassal had not discharged the burdens of it.

[*Fac. Coll. IV. p. 321. Dict. 10,711.*]

ALEMORE. I must presume that there was a blunder, if no resignation is produced. There has been no possession, consequently there is no prescription.

HAILES. Sir John Gilmour, president of the Court of Session, was called up to London on purpose to advise the Duchess of Buccleugh's marriage-contract. I would rather presume that there was no blunder in a deed advised by so able a lawyer. The pursuer's only title is as heir to Francis Earl of Dalkeith, under the charter 1742. That charter does not contain the alternative *aliisque jus habentibus*, on which the pursuer's argument is founded. He must take his own charter as it stands.

KAIMES. If the wardholding had continued, the family of Buccleugh would have clung to this feu-right. Why should they be allowed to recur to the wardholding, after they have been abolished by law.

PITFOUR. If there was no prescription, the family of Buccleugh might recur to the old right. But I cannot get over the exception of prescription. Prescription must be according to the nature of the subject. The possession of superiorities does not depend upon the levying of feu-duties: the question is, who was owned as superior? Here it is plainly the Crown. Sir John Ker was never owned. There is also an acknowledgment by charters that the lands held feu. We cannot give any judgment as to bygones: they must be judged of by the Court of Exchequer.

PRESIDENT. I doubt whether the feu-duties belong to the Crown; but that cannot be determined here. The only question is, as to the nature of the holding. Supposing that Sir John Ker had contrived to levy the feu-duty, would not the holding have been still of the Crown?

AUCHINLECK. Every charter granted was a virtual acknowledgment, on the

part of the Crown, that there was some other person in the right of the superiority : *aliis jus habentibus* is a very singular clause, and is of that import.

COALSTON. I always supposed that the charter 1664 was erroneous, and that the family of Buccleugh might have been restored, if a demand to that effect had been timeously made. I should have thought that the Crown would have acquired right had there been no specialty here. The only difficulty is from the clause *to those having right*. While such a clause is in the charter, how can the Crown be said to have acquired a right ?

On the 5th August 1768, the Lords sustained the defence of prescription as to the holding, and remitted to the Ordinary to hear parties as to the feu-duties.

On the 16th November 1768, "refused a reclaiming petition, and adhered."

Act. A. Lockhart. *Alt.* A. Dundas.

Reporter, Auchinleck.

Diss. Alemore, Elliock.

Non liquet, Kaimes.

1768. November 15. JAMES, ANDREW, &C. WEMYSES *against* DAVID WEMYSS.

MUTUAL CONTRACT.

Marriage-contract, though not signed by the wife, may bind her and her issue.

[*Faculty Collection*, IV. p. 324. *Dictionary*, 9174.]

HAILES. The one party pleads that the marriage-contract is effectual in part, and void in part ; the other, that it is void altogether. I agree with neither : I think that it is effectual altogether. The wife did not sign it, but the other parties did : the father-in-law performed what was incumbent on him. The husband always supposed himself bound : the wife performed the only obligation prestable upon her,—she solemnized the marriage. After a homologation of more than thirty years, she comes too late to object against this contract as not binding. It is as much required in law that a woman sign her marriage-contract before witnesses, and that she heard it read over : neither solemnity is well observed ; and if ladies are permitted, after the celebration of the marriage, and even upon its dissolution, to object to the conventional provisions, on account of these solemnities having been omitted, nineteen of twenty of the ladies in Scotland will be found entitled to their legal instead of their conventional provisions.

MONBODDO. If the wife is bound by the marriage-contract, both my interlocutors will, of course, be altered ; but I see no principle of law upon which she can be bound. There is a decision in the *Dictionary*, title *Privileged Writs*, *Duke of Montrose* 1728, whereby the contrary was decided.

KAIMES. There might be some difficulty were there any reason to suppose that the wife knew nothing of the marriage-contract ; but this is not pretended. On the contrary, she actually solemnized the marriage.

PITFOUR. The decision 1728, *Duke of Montrose*, was firmly given, and not disapproved of. The younger children are bound, and the father-in-law, as burden-taker for his daughter, is also bound. When there is a burden taken, a contract will not be reduced, although the principal on one side does not sign. If there is no obligation on the one side, neither is there on the other ; but, if I choose a burden-taker to be my party, I am bound by his subscription. How can a wife be deprived of her *jus relictæ* without signing a contract, since it is only by an express renunciation that the *jus relictæ* can be set aside ?

AUCHINLECK. In marriage-contracts the greatest honesty and fairness are required. It is sometimes necessary for the bride to adhibit her subscription, when she has a portion to convey. But, generally, the portion proceeds from the father, and he alone carries on the treaty. Very often the bride signs only one page, or simply adhibits her initials. There occurred a question between *M'Kenzie of Luddie* and *M'Kenzie of Bennangfield*, where a person did not sign a submission, but met with the arbiter ; he, on that account of his not having signed, objected to the decret-arbitral, acknowledging at the same time, that, if the decret had been favourable, he would not have objected. This was found to be fraud, and the Court held him as bound. The same thing occurs here : Can this woman lie by for thirty or forty years, and then object to the formality of the contract, whereof she does not pretend that she was ignorant ?

PRESIDENT. The tocher, provisions to the younger children, jointure, are all *partes ejusdem negotii* ; How can you separate them ?

MONBODDO. The wife is a principal party, the father-in-law is only cautioner : How can we say that the principal, who does not subscribe, is bound, or that the cautioner is bound when the principal party is not ? That the marriage followed, is nothing to the purpose ; for the marriage might have followed although there had been no contract at all.

On the 15th November 1768, the Lords found the marriage-contract obligatory on all parties, in respect that the marriage followed ; and altered the interlocutor of the Lord Monboddo, Ordinary ; and remitted to him to proceed accordingly.

On the 1768, refused petition, and adhered.

Act. A. Lockhart. Alt. Ilay Campbell.

1768. November 17. ALEXANDER FRASER of CULDUTHILL *against* SIR JOHN GORDON.

MEMBER OF PARLIAMENT.

The Trust Oath cannot be put before the meeting of freeholders is constituted by the election of Preses and Clerk.

[*Dictionary*, 8777.]

AUCHINLECK. The statute is express. It requires an alteration of circumstances allowed by freeholders. This implies that the freeholders must judge. As to the oath, it may be tendered before the choice of preses and clerk. This was the opinion of Craigie, Lockhart, and myself, in the case of *Selkirk*, where the election turned upon that circumstance. The losing party was so well satisfied of this, that there was no complaint lodged. The reason is obvious: As to taking oaths, the man, not the meeting, must judge. But still I think Sir John acted irregularly in tendering a new oath. If the preses may change the oath so as to prevent a man from taking it, he may do as was once done in Stirlingshire,—he may make a new oath to remove the swearer's scruples.

MONBODDO. The proceedings of this Head Court were subversive of all order, tending to turn a meeting of election into a Polish diet. The last commissioner took upon him to do what your Lordships would not do. He struck a freeholder *de plano* off the roll. Next, he administered a new oath. I doubt whether Culduthill was bound, at that period, to take even the statutory oath. However, he took it.

PRESIDENT. The Act 16th Geo. II. is not a penal law, but a law well calculated for preserving order in elections. The parliamentary preses must call the roll. He must read and do nothing more. I think the trust oath may be tendered at the very beginning, for otherways one might cast the election who had no right to vote. However, the oath which Sir John Gordon put was not the trust oath.

On the 17th November 1768, the Lords found Sir John Gordon liable in the statutory penalty for omitting to call Culduthill's name.

Act. Ilay Campbell. *Alt.* H. Dundas.

1768. November 18. MAGISTRATES of GLASGOW *against* WILLIAM MACDOUGALL of Castle-Semple.

COMMUNITY—BURGH-ROYAL.

Magistrates may alienate the common good for the advantage of the borough.

[*Faculty Collection*, IV. p. 328 ; *Kaimes's Select Decisions*, p. 336 ; *Dict.* 2,525.]

MONBODDO. As to the general point, I do not think that the Magistrates and Town-Council of a royal burgh are no more than mere administrators, like tutors and curators. They are the borough, the head, the wisdom, the council, of the borough. As soon as a borough is without magistrates and council, it is no longer a borough. No general law restrains them from alienating. The only restraint is by statute. Craig, in laying down the doctrine as to the power of alienations, makes no difference between that of bodies politic and that of persons. He indeed makes a distinction, as to boroughs, which the law does not make. He refers to the statute, which says nothing of alienation, and only respects the power of granting leases. Besides, his authority goes no farther than to the subjects originally granted by the king. As to the second question, which is special to the present case, I think the Magistrates have a power of selling, notwithstanding the charter 1669 and the ratification in Parliament. If one should entail a barony, and afterwards acquire another barony, and unite it to the first, would the entail of the one have any influence on the other? Certainly not. The ratification might be effectual against the Crown, but can never touch the interest of third parties. There are precedents of the Court for my opinion; the power of feuing out is more than the power of selling the feu-duty. The Town of Aberdeen has been in use to feu out, and then to sell part of the feu-duty.

AUCHINLECK. My opinion, as to the first point, is different from that delivered. When the king, for the public good, makes a grant of lands to burgesses, and inhabitants, to be held by them *more burgi*, under an obligation to watch and ward, &c.; from the nature of the thing this grant is qualified for a particular purpose, and cannot be alienated; for that alienation would disappoint the trust. Every statute speaks this to be the case. There are acts restraining the granting of leases beyond three years. If the subject could be sold, why make such a restraint? It argues that the Magistrates and Town-Council had no more than a year of administration. There are many grants upon record, whereby the king gave to magistrates a power of feuing. This question is a matter of great consequence. There may be magistrates who are bad managers. Every proprietor in a borough has his property liable for the debts of the town. The magistrates contract debt, drink the money, sell the common good. *Who* is to pay the debts? If the question was, Whether the Town of

Glasgow might sell its tolbooth, I should think not. But the present case is different. The particular purchases made by the magistrates, out of their savings, must remain at the disposal of the magistrates. I do not think that the annexation was intended to hurt the buyers. The annexation only meant that the subject should be inseparable from the borough as long as the borough remained proprietor. An alienation makes a separation, and then there is an end of the provision. The ratification makes no odds : that passed in course, and did neither good nor harm.

GARDENSTON. Magistrates and Town Councils are the representatives of the boroughs, in this sense,—that they have a certain power of administration and of jurisdiction. I think that magistrates have no power of disposing of the original patrimony ; but they have as to an estate bought by their predecessors. The charter, 1669, only meant that the lands, while they remained with the borough, should remain inseparable from the borough. But they might have resigned the lands over again, and left out the clause : the same power is still in them.

PITFOUR. I have no occasion to lay hold of specialty, for I am clearly of opinion that the magistrates have the power of alienation. It is agreed that they may feu, and that is a higher power than the power of alienating a superiority is : every subject, unless restrained, must be *in commercio*. There is no law which puts the common-good of burghs *extra commercium*. If, indeed, the king should grant a charter, prohibiting alienation, this will be effectual, regulating the mode of the right. In Craig's days, burgage-holdings were a species of ward-holdings, and, consequently, could not be alienated without the authority of the superior. If the magistrates contract debt, the subject may be adjudged ; why then prohibit to sell ? Shall a legal, and not a voluntary sale, be effectual ? If any thing is inseparable from the town, as the tolbooth, fairs, and the like, it cannot be alienated. It is objected, that here is a total alienation, which is not in a feu. But, by feuing, you may give away the substance and retain a trifle : here you sell feu-duty, which is unimprovable, to gain a sum of money which is improvable : in the same way a barren muir may be exchanged for an improvable subject.

HAILES. I have observed, in the deliberations of this Court, that, when a case may be exhausted by determining one point, no judgment uses to be pronounced upon other points. I am now satisfied, from what I have heard, that the subject in question may be sold, as it was bought ; and that neither the charter 1669, nor the ratification in Parliament, stands in the way of the sale. This is a case which will seldom occur ; for royal boroughs will have occasion to sell lands which have been purchased by saving of the public revenues. As to the general point, I have still great difficulty : When the *Iter Camerarii*, and our other ancient books, are examined, no trace of any such power in the magistrates can be discovered : it has been found that they may feu ; but still this is less than alienation. It is, perhaps, owing to my want of apprehension ; but I am still to seek how the retaining the *dominium directum* can be a higher exertion of property than the alienation of the *dominium directum* as well as *utile*.

KAIMES. It is hard to say whether the Kings of Scotland originally meant to give a feu or a grant in perpetuity to the corporation. I think that, as to the

pleading, said, that *apud nostrates* in Craig meant *with our ancestors*: that this was but a conjecture, for that he had looked in the Dictionary for *nostrates*, and could not find it there. The President said, "Lord Advocate, you have a very bad dictionary." But the Advocate's dictionary was not to blame, if the search was made for *nostrates* instead of *nostras*. A Greek dictionary may be a good one, though it does not contain in the plural number.

1768. November 23. MR ROBERT HUNTER and OTHERS, *against* The DUKE of HAMILTON.

COMMONTY.

Possession of an uncultivated Commonty by pasturage, and casting feal and divot, on a title of part and pertinent, infers a right of common property.

[*Faculty Collection*, p. 142 ; *Dictionary*, 2481.]

PITFOUR. A right of servitude will not give a property, neither will a right of common pasturage ; and still less will a grant of *parts and pertinents* give property, without prescription ; *quod minimum est* must be presumed. If a feuar is once made a joint proprietor, the superior cannot give a servitude on the muir to any other person. Why give a share greater than the feuar has occasion for ? If such is the construction of the grant, I do not see that prescription can make any odds ; for there is just the same sort of possession there would have been, had there been only a servitude. The grant now contended for by the feuar, is what he had no right to ask, and what no wise man would give. The distinction made in the case of *Biggar* was so slender, that I could never lay hold of it. The case of the *Mearns Muir* is not in point ; for there the feuars had expressly granted to them a proportional part of the muir.

ELLIOCK. According to the doctrine now laid down, all the common muirs in Scotland ought to be divided anew.

GARDENSTON. I am moved with this argument, that, if *part and pertinent* implied property, no feu after the first could be granted without the consent of the first feuar.

AUCHINLECK. A whole muir is possessed in common by the tenants of my barony : I give off a farm to one, and his share of the common ; will that hinder me from giving off other farms, and a share of the common, to each ?

PITFOUR. The 5th Act of the 16th Parliament, James VI., implies that though the ground about muirs was feued out, yet still the property of the muirs themselves was reserved.

PRESIDENT. That Act of Parliament seems to have no relation to the present controversy : it relates to the King's property actually reserved. The decision of *Biggar* is a leading case often quoted and often followed. There may be

of Peers determined is only one point: It could not in justice determine, nor can it be supposed to have determined, more.

BARJARG. This is a sort of conditional decree. We found upon one point: if our judgment is reversed, the other part of our interlocutor must be reversed also. An extract, upon an interlocutor of this kind, cannot take the cause out of Court totally.

PRESIDENT. My difficulty is here: The interlocutor is final, finding that the freeholders did wrong, &c. The House of Peers decrees the contrary; How can we proceed farther? The fault was in the petitioners: they did not manage their cause right. At the reversal, or even after the reversal, it was competent for them to have applied, and to have got the cause remitted to this Court. This would have been granted of course.

KAIMES. If one of the parties, by appealing, can cut out the other party, he may cut himself out, but he can do no more. I do not put this case upon the inconveniency or hurt arising; because the party hurt might have procured a reservation which would have secured him, and yet neglected it.

PITFOUR. Most appeals are from particular interlocutors. When there is no decerniture, there is no occasion for a remit. The cause comes back of course; but the case is different when the Court closes the chequer. The decree of this Court is, that Mr Elphinstone shall be expunged. The House of Peers says, that he shall stand upon the roll: How can we dispute this? Here there is no inconveniency but what is owing to the neglect of parties: they had a remedy by seeking a remit, but they did not use it.

GARDENSTON. I cannot see either common sense or common justice for holding a decree of the House of Lords to be final, in points not tried. Suppose that there were a reduction upon three grounds;—that the Court of Session determined one point, and reduced the deed, and, at the same time, found it unnecessary to go farther, the deed stands reduced, as long as the decree stands which reduces it; but, if the decree is altered, it becomes necessary to try the other points. This question may be of little moment in a case of a vote; but it is of moment as affording a precedent in the greatest causes.

AUCHINLECK. The intention of the Court was solely to determine one point, but still my difficulty remains. Suppose, in a case of property, there is a reduction on various grounds; one reason of reduction is sustained, and there is no appeal:—May a man, after extracted decret, come to us and desire our judgment upon the points undecided? We are *functi*, and have no power over that particular libel. *Here* is the same thing. The House of Peers did not mean to determine more than we did. But the words stand against our proceeding further, and the parties ought to have taken care of this, and represented that, if there was not a reservation, the cause would be out of Court by the forms of the law of Scotland, in virtue of the extracted decret.

KENNET. It was impossible for the Court, on former occasions, to determine every point in every election cause. This would have multiplied causes beyond measure. I am not moved by the extracted decret; *that* was not voluntary; the petitioner was bound to extract in order to support the judgment. But how can we find that the party ought to be off the roll, when the House of Peers says he shall be on the roll?

On the 10th March 1768, the Lords, having heard the judgment of the House of Peers, refused the petition.

On the 23d November 1768, they adhered.

Act. H. Dundas. *Alt.* D. Rae.

Diss. Kaimes, Gardenston, Barjarg, Hailes, Monboddo.

1768. *June 15, and November 23.* HENRIETTA SINCLAIR *against* CHARLES SINCLAIR of Olrick.

LEGITIM.

1. Effect of a discharge in a contract of marriage upon the wife's right of legitim, or claim upon her father's executry.
2. In what cases the heir is entitled to Legitim.

(*Faculty Collection*, p. 519; *Dictionary*, 8188.)

PITFOUR. A discharge of all claims implies all claims whereof the party discharging can compel performance. The legitim is of this nature; for a father cannot disappoint a child of the legitim: but the stipulation of a discharge of a right of succession is inept; for why should I desire a discharge from a child, of what I may settle without the child's consent? It is true that there sometimes occurs a discharge of all that the child can succeed to, and this is held to be a virtual testament in favour of the other children. In heritage, the heir cannot be prejudiced by exclusion, for it is necessary that another heir be instituted. But there is a difference in moveables; there, exclusion of one child implies an institution of other children. General words of *ask and crave*, will not apply to the dead's part.

GARDENSTON. There are here additional words,—Upon any account whatever. They are such as must have a meaning. A discharge of what could be asked through the husband's death, has been extended to what could be asked through the wife's death.

PITFOUR. There the words were only descriptive and explanatory, and the clause was so complete without them, that it implied all. The Court found it to imply.

MONBODDO. I would give some operation to the general discharge; but a right of future succession must be discharged in express words. This sort of renunciation was quite improbated by the Roman law: It has been admitted, indeed, in modern practice, as appears in Antonius Faber's *Decisiones Sabaudicæ*; but the renunciation must be upon oath. I do not know whether this ever took place with us. The same decisions show, that the renunciation must be in express words; and this, I think, is also the rule with us. Had the words been in and through decease of the father, the case might have been different.

COALSTON. There is a distinction between the case of heritage and that of moveables. An heir cannot effectually renounce, but an executor may. If

that had been the import of this clause here, I should have thought it sufficient. The general words are not altogether ineffectual. They would import a renunciation of what Henrietta Sinclair could have claimed by her mother's marriage-contract, or the like.

On the 15th June 1768, the Lords found the discharge does not exclude the daughter from her father's executry.

For the daughter, T. Swinton, junior. *Alt.* A. Lockhart.

Reporter, Auchinleck.

[A petition was given in against this interlocutor: on advising which, the following opinions were delivered:—

PITFOUR. The legitim is not extinguished. Though Henrietta Sinclair has renounced, her brother has not; and he is entitled to it. Legitim, in law, is not confined to younger children: the only thing that bars the elder brother, is his obligation to collate. I question whether there is here room for collation; the legitim belongs to all the children. This is laid down by Lord Stair and by Sir James Stewart, and so it was found in the case of *Justice*, 1737. It is a principle, that, whenever a child renounces its legitim, *habendus est pro mortuo*; and it is so laid down in all our books. Can the sister say to her brother, You must collate? No; for collation is only to be claimed by parties who have a right in the subjects to be collated; and she has none, because she renounced. Suppose the sister died without renouncing, and left children, the heir has the legitim: the children of the sister cannot make him collate, for that they are excluded from the subject by their mother's death. Suppose the father has left a universal legatee, he concurs with the brother and seeks the executry. Good: But the legitim goes to the brother notwithstanding. So, in the same way, the universal legatee excludes the sister, because she has renounced. Suppose the relict competes with the brother, she will not exclude him, but she will exclude the sister. The only thing that creates a difficulty, is *Agnew's* case in 1749, where the direct contrary was found. In that case the Bench was divided, and the decision was not relished. A decision in an arbitrary question is of great authority; not so when pronounced on wrong principles. The cause was not fully pleaded at first; and some Judges are like the old Bishop, who, having begun to eat the asparagus at the wrong end, did not choose to alter.

BARJARG. The case of *Agnew* is in point: that cause was fully argued, and I would follow it.

MONBODDO. Foreign law is matter of fact; but our law ought to be a matter of reason and principles. I am not determined by precedents. I think the judgment in the case of *Agnew* was demonstratively wrong, as Lord Pitfour has shown.

PRESIDENT. It is an error to say that an heir is not entitled to the legitim: He is entitled; but he may sometimes be debarred from taking it, unless he collates. The decision in the case of *Agnew* was not unanimously pronounced. The President, Justice-Clerk, (Tinwald,) and Drummorie were for it; but Kilkerran and Elchies were against it.

On the 29th July 1768, the Lords found Charles Sinclair entitled to the legitim.

On the 23d November, 1768, they adhered.
Act. J. Swinton, D. Rae. *Alt.* A. Lockhart, D. Armstrong.
Reporter, Auchinleck. No votes at last hearing.

1767. July 21 ; and 25th November 1768. DUKE of ROXBURGH *against* EARL of HOME.

SALMON-FISHING.

A Fishing in the Tweed possessed jointly by a Scots and English Heritor, how far subject to the regulations of the Act 1696, cap. 33, and to the cognisance of the Court of Session.

[*Dictionary*, 14,272.]

HAILES. Of the opinion of the Lord Ordinary's interlocutor: the slop on the south side of the river can never be the slop intended by the Act 1696, for that it is without the jurisdiction of the Court of Scotland; and, consequently, Lord Tankerville may shut it up whenever he inclines. The argument, from custom, does not affect me: a public law is not abrogated by particular consuetude. So was found, not only in the case of *The Fishings of Ness*, but also in the case of *The Fishings of Craigforth*. The case of *The Water of Ericht* was a singular one. The bulwark, there, was ratified by Parliament, and the immemorial possession followed upon that Act.

MONBODDO. The Act 1696 was never in use in this river. I cannot divide the river, nor the dam-dike. If one part is not in Scotland, the other cannot be regulated by the law of Scotland. Possession and custom go far towards the interpretation of the statute. The case of the water of Ericht is rather stronger than the present case, where there was a bulwark quite cross the river from time immemorial. The interest of the mill is to be considered.

AUCHINLECK. As to the interest of the mill, undoubtedly that is the primary use of the river, and the mill must be served. The Acts concerning salmon-fishings have been considered by the court as relative to public police; the Act 1696 is a general law; and I do not see that the Tweed is exempted from it. It is true, that part of the river is not under our jurisdiction; but, so far as our jurisdiction reaches, we must support this salutary regulation of the mid-stream. If Scots people were convicted of killing smelts in this river during forbidden time, they would be punished: the mill-dam has no mid-stream; but, what is equivalent, it has holes, which will answer as well whenever the nets are taken out. This was ordered by the sheriff, and approved of by the Lord Ordinary, and is a good expedient: it makes no difference that the law has not been put in execution as to the fishers of this river. The Ness fishers also pleaded that they were *legibus soluti*; but their plea was disregarded. The case of Ericht is a *strong* case, and I doubt of its justice. Besides, in that case,

Mr M'Kenzie was specially infest in the bulwark. The pursuer seeks to have the dam new-modelled ; but this will not be allowed : there should be openings, provided that those openings do not hurt the defender's mill.

PITFOUR. I cannot think that the legislature, by the statute 1696, meant to comprehend the Tweed. 1. There is immemorial possession to the contrary. 2. It is probable, from the rapidity of the river, the fishing could not be carried on in another way. 3. A river between the two countries cannot be subject to the Scottish regulations. During a truce, at the beginning of last century, it was provided, that the proprietors of fishings on the Tweed should exercise their rights of fishing as formerly : so stood the law before 1696. And the Act, 1696, did not alter any thing. The Scottish legislature could never mean to inhibit its own subjects from the exercise of this right merely with the view of forcing the fish into the hands of the English. The Act, 1696, means no such thing. It relates to rivers wholly within the jurisdiction of this kingdom ; for how make a *mid-stream* when they had no jurisdiction over any more than one half of the river ? The regulations of the statute, 1696, are very proper where they can be executed : but they cannot be executed in the Tweed. I am not affected with any of the precedents : as constant consuetude established the right, so constant consuetude explains the law.

GARDENSTON. The Act, 1696, does not extend to the Tweed. The river is not within the kingdom. Had the legislature meant to comprehend the Tweed, it must have made other regulations for that river than those of the Act 1696. It would not have provided for a *mid-stream* there : how can half of a river be regulated by the law of Scotland, and the other half by the law of England ?

COALSTON. The regulations concerning fishings are matters of public police ; and, therefore, if this river were in the common case, I should think possession not sufficient. The old laws do not relate to Tweed. The commission for executing the laws as to fishings, granted in the reign of James VI. does not mention Tweed. The Act 1606, does, as to fishings in forbidden time ; and I suppose there was some such law in England at that period ; but the Act says nothing of the *mid-stream*, &c. The only question is, whether the Act, 1696, extends to Tweed ? I cannot think that it does.

KAIMES. If the words of the Act are taken strictly, Tweed is comprehended. On the other hand, the reason of the thing is urged. I do not think that the consequences will be such as represented by the defender ; for, if the holes are kept open, salmon will run up by them. The principle on which I would give judgment for the Duke of Roxburgh, has not been hitherto mentioned : it is this,—no man can, by his own authority, draw a bulwark across a river, and thereby deprive the superior heritors of all fishing : he may make mill-dams, it is true, but then he must make them with as little hurt to the superior heritors as possible. The Act, 1696, is not a new regulation : it is for ascertaining the common law ; and it does it in a rational manner, that the mill-dams may subsist,—but that they may subsist so as not to deprive the superior heritors of all salmon-fishing. Where the river Tweed runs through Scottish ground, the Act, 1696, will apply to both sides : where it runs half in England and half in Scotland, it will apply to the Scottish half.

ALEMORE. As long as I remember any thing, I have heard those works

complained of: I have great doubts why the law should not extend to Tweed, as far as our jurisdiction extends. If the slop is made, salmon will run up, instead of entangling themselves on the English side. If the position laid down for Lord Home is to hold, what is there to hinder all the inferior heritors from building bulwarks across the river? They will be under no jurisdiction either of Scotland or of England. All the laws about fishing are calculated for the benefit of the superior heritors. The former Acts, excepting Tweed from the laws as to killing fish in forbidden times, were barbarous and impolitic. Because the English, by irregular fishing, hurt themselves and us, we would do the same. These laws were altered upon the Union of the Crowns. The Act, 1696, does not mean mathematically the middle, but the mid-stream, which may be on one side, and which may be divided, and run on both sides. Why should not the Act, 1696, be extended to Tweed, as well as the former Acts, at the Union of the Crowns, were extended. You do not thereby throw more fish on the English side, but the contrary.

PRESIDENT. The Act 1696 is general, and must extend to the Tweed. The right before 1696, vested in the parties, was no more than a power of fishing. Had Tweed never been excepted from any of the Acts, the argument would have been stronger for the defender. The Act 1606 took away the exception. Had the Act 1696 meant to make any exception as to Tweed, it would have so provided. Here is a Scots dike and a Scots mill, for the dam does not reach over to the other side, and a Scotsman has a servitude upon the Englishman. I have no concern with English law; but I would give force to a Scots Act as far as the jurisdiction of this Court extends, leaving the English to manage their own laws as they please.

KENNET. Of the same opinion. The permission to kill fish in forbidden time, in the Tweed, is by special statute, which shows that the Tweed, in so far as Scottish was understood, was to be subjected to the laws of Scotland. The argument, from the supposed advantage of Lord Tankerville, would be stronger, were there to be no slop, than on the contrary.

The Lords, (21st July 1767,) found that the regulations 1696 extend to the river Tweed, and remitted to the Lord Ordinary to proceed accordingly.

Act. P. Murray, H. Dundas. *Alt.* D. Rae. *Reporter*, Kennet.

Diss. Coalston, Pitfour, Gardenston, Monboddo.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered :—]

AUCHINLECK. If this is a Scots fishing, the Court has jurisdiction. What is the boundary between Scotland and England? That must depend upon possession. Had Lord Tankerville possessed the whole river, the boundary would have been the north side. Here the case is different. The two Earls have possessed the fishing as common. The dam-dike was upheld by them mutually. The fish were divided. It is therefore not a Scots fishing, nor an English, but common to both countries. Suppose there were here a dry march, how could a common in both kingdoms be divided? Lord Tankerville is not amenable to the Courts in this country. Our rule of dividing by the valued rent does not take place in England.

Diss. Strichen, Kaimes, Gardenston, Coalston ; Elliock. At the second advising, *Diss.* Gardenston. (Coalston absent.)

1768. November 25. MRS CATHARINE SINCLAIR and OTHERS *against* DAVID THREIPLAND SINCLAIR.

PROVISION TO HEIRS AND CHILDREN.

Extent of the father's power of distribution of the conquest provided to the children of the marriage.

[*Sel. Dec.* p. 338 ; *Dictionary*, 13,007.]

COALSTON. Where a father obliges himself to provide a sum, or conquest, to the children of the marriage, they are partly heirs, partly creditors. As creditors, they may take, without service, and may reduce fraudulent grants. A father has a power of division, not arbitrary, but rational. He cannot disappoint any one. If he divides, he must divide the whole. Yet he may transact with his children, and take discharges. If he does this as to the whole children, there will be an end of the obligation. The only question is, as to the effects of this case, where one or more children discharge, and one does not discharge. The obligation is *familiæ*, but still each is an heir and creditor conditionally, if alive at the death of the father. Here is distinction : When one or more grant a discharge to the father, and die before him, that will only enable him to impute. But, if otherwise, there must be a bipartite division. The case of *Allardice* seems in point ; and I would give great authority to a decision of the House of Peers. The only difference between that case and the present, is, that *there* the discharge was granted after the dissolution of the marriage ; but that matters not, because children may die after the dissolution of the marriage, and before their father. One may discharge a conditional uncertain obligation. Marjory's *share* was the conquest, and her share is discharged.

ALEMORE. I cannot see what advantage children can gain by the defender's doctrine. Besides, not only their interest, but that of the bride's friends, must be considered. A father is bound to perform specially, though he may divide rationally. The difference of *Allardice's* case from this, is, that, at the period of the decision, it was supposed that children had a right to an equal share of the subject.

KENNET. This is a general and a delicate question. Great regard ought to be had to marriage-contracts, so also great regard to the father's powers. What Marjory accepted must stand for her half ; the children are creditors, and may transact : this is for the benefit both of father and children. I think that Marjory is bound by her marriage-contract ; for she is a party, and signs it, in an obligation, for a precise sum. The father is debtor to the children, and he may transact ; why should his transaction benefit third parties ? If there had been

one child only, he might have transacted ; and so also if there had been many : If each child was to succeed *per capita*, the father might also transact ; why not in this case ? Whenever any fraud appears, there will be redress ; but here there is none ; and Katherine cannot complain, for she gets one full half of the conquest. Had Marjory not discharged, Katherine would have got no more.

GARDENSTON. Here are two daughters entitled to conquest : one of them discharges her share ; what is her share ? As there is no distribution by the father, it is the one half ; if so, what can the other claim more than the other half ? Suppose the conquest had turned out to be no more than 12,000 merks, and 10,000 merks given to one, should the heir have right to say, I will give you but 2000 merks ? No : he would be bound to give 10,000 merks to the one, as the father had given 10,000 merks to the other ; and thus, by the partial transaction, 20,000 merks would go for a conquest, which amounted to but 12,000. When the advantage is on the father's side instead of the children's, the rule must be the same. We are bound to support the discretionary power of the father when no fraud appears. Katherine has now as much as she would have had upon a rational division, namely, one half. Children may bring an action against the father for ascertaining the quantity of the conquest. They are creditors equally under the father's power of division, which is conditional. How can Katherine say she is hurt ?

AUCHINLECK. Marriage-contracts ought to be fairly and honestly implemented. The father may bargain with his children : for he is debtor, and they are creditors. But then the father is also trustee for his children : this is an ample and a favourable trust. If the father make a fair transaction, it is good, because it is a transaction between debtor and creditor ; but, if the transaction is *contra fidem tabularum*, contrary to the trust, and, instead of fulfilling the obligation, seeks to put money in his own pocket, the case is different : were this allowed, there would be an unlawful transaction, by which he ought not to profit. Here the question is, Whether Southdun has been enabled to do anything for disappointing the contract ? He has given a share to one : the question is, whether the other is thereby affected ? How can the discharge exoner Southdun beyond what he has paid ? In so far as he has paid, he is bound.

JUSTICE-CLERK. I do think that the decision of *Allardice* is in point : at the same time, I am not unaffected with the bad use that may be made of this power in the father. I hope that the law will be strong enough to disappoint any fraud, if it should ever be attempted. I wish I saw a provision made in law so as not to allow the father to transact with children ; but I see no such provision : I was at first struck with the idea of a trust in the father ; but I think this is not agreeable to the ideas of people of this country, for then a thousand cases would have occurred of children calling their fathers to account. I am apt to believe that the case of *Allardice* has been adopted by the nation as law. Whatever difficulty I might have entertained, had I then sat on the bench, it is now too late to look back and throw the country loose.

HAILES. I also am determined by the judgment in the case of *Allardice*, given in this Court, and affirmed in the House of Peers. This is a rule to walk by, where the principles do not seem clear, and where the expediency on the one side or other is extremely dubious.

MONBODDO. The interlocutor contains an argument : I can neither agree in the *premise* nor in the *consequent*. The interlocutor says that Marjory did discharge her.

share: I do not think that the marriage-contract did this. It would be extraordinary if the father's becoming bound to pay a sum to the father of the bridegroom should be understood as a discharge by Marjory. *Pactum de hæreditate viventis* was improbated by the Roman law, and so also in other countries; it is permitted in our law, but then express words to that effect are necessary. Here is a common clause of style: the clause discharging is omitted; this must be supposed done *dedita opera*. A father to transact with his child, and to take the right of succession of herself to himself; I would require strong words for that, which I do not see here. Join to this the ample form of Southdun's second deed, which Marjory did not accept: that second deed shows the father's idea of the first. As to the consequence in the interlocutor, that this discharge implies a restriction of Katherine to one half of the conquest, this is implication upon implication. I lay great weight upon this, that, at the time of Marjory's marriage-contract, Southdun's marriage was subsisting; at that time, therefore, Marjory had nothing but a *spes successionis*. Is there in practice any example of a child conveying a right of this kind, *stante matrimonio* of the father? The share of the child may be affected by a transaction; but still this will not impair the right of the other children. Were the contrary doctrine established, it would give rise to many evil transactions. It is said, that, in every case where a debtor takes a discharge, a conveyance is implied: I deny this. When a debtor pays, and simply takes a discharge, this is no conveyance. So it was by the Roman law, and even by our law: if an heir of entail pays debts of his predecessor, and takes a discharge, he cannot rear up such debts: there is no reason here for making an exception. Here was not a debt, but a right of succession; there is no principle of law, nor analogy of law, for this decision. Conquest is no more than a *spes successionis*; if any of the children die, they transmit nothing to their brothers and sisters. The only difference between this and the legitim is, that legitim is affected by gratuitous deeds, conquest only by onerous. In this view of the case, the argument for legitim is strong. Neither is there the authority of any lawyer for the decision. As to the decision of *Allardice*, there the son had not discharged; but the daughters had expressly discharged and renounced after the dissolution of the marriage; and both Courts understood that this discharge, made after the right had accrued, was with the view of enabling the father to make provisions for the children of another marriage.

KAIMES. When a father exercises his power of division, he must make the whole effectual to the children: if a father has not, or if he renounces this power, then each child has a separate power, and the father may transact separately with each. I am thus reconciled to the decision of *Allardice*; at that time it was not thought that the father had a power of division. The present case is where a power of division was reserved to the father; he keeps it in his sleeve, and transacts with a child for less than the probable half of the conquest. A man may know the extent of his conquest, though nobody else does; he may concuss his children one after another. *Quæritur*, On which side does the inexpediency preponderate? Here Marjory gives a discharge, and what shall be its effects? It must, in strict law, accrue to the father, for there is no third party concerned in it; but here there is a consideration in equity: a child is not at liberty to refuse to transact. Marjory could not thwart her father; for,

had she disobliged him, he would have given much the largest share to her sister. If there had been a certain sum provided to the children, this would have been strong; but here there was an uncertainty arising from the unknown extent of the conquest. The argument, that *nihil deest* to Katherine, because she has her full half of the conquest, is also strong. Upon the whole, I am so doubtful that I decline giving my vote.

PRESIDENT. I think Katherine is to be preferred. The provision of conquest is an obligation: the power of division in the father is politically good;—he cannot, however, pocket up any part of it. The sum in the provision is *familiæ*, and must be given *familiæ*. If a provision is made to be divided *equally*, then the father may transact, because each child has a separate right: the father here has not said that he has cut off Katherine's right: he has not made a division. A father may send out a son into the world, and he may transact with him, providing he gives the rest to the other children. Thus all is well: but it would be dangerous to give him a greater power. I would support the *patria potestas*. I would allow liberty to provide for the children of another marriage; but I think there is much hazard in going any farther. There is a confusion and perplexity in the case of Allardice:—there the son had got one full third, and it was thought that he had claim to no more.

PITFOUR. The words of Marjory's marriage-contract clearly discharge Marjory's share, and must accresce to the father. Her *share* is the same thing as in satisfaction. She has not discharged the legitim, &c. but that will not hinder the discharge from being effectual, so far as it goes. It is said that this does not import a division, but only an extinction of Marjory's share; but there is no difference between an extinction and an assignation where the debtor is the only party: no man will seek an assignation of his own debt. The objection as to a society among the children is nothing, for every child may separately pursue. It is commonly impossible to get all the children together, to grant a joint discharge. The case of Allardice was in point,—a decision *in jure*, affirmed by the House of Peers. True, there was no power of division *there*; but that was implied. True, that there the marriage had been dissolved; *here* not. This makes no difference, as the provision was of doubtful extent, although the marriage had been dissolved: indeed, it was possible, in Allardice's case, to ascertain how the conquest stood at the dissolution of the marriage; and, consequently, there might have been more ground for a challenge of fraud in that case than in the present. The question, To whom does the discharge accresce, in a transaction *in re dubia*? was most solemnly determined in Allardice's case; and from that time I considered the point as fixed. Let us consider the ground of the decision. In the nature of the thing, what is the import of the deed? *Actus agentium non operantur ultra eorum intentionem*. Neither Southdun nor Marjory had the right of the third party in view. As to expediency, I should be sorry if no man were to enter into a marriage-contract till he could give as great provisions as the bride's friends might expect. It is not the best contract of marriage that makes the best testament: most contracts of marriage are upon conquests. When sons go abroad, or daughters are to be married, a case like the present one occurs. It has been asked, are there any instances in practice of a transaction like this? I answer,

there are just as many as there are instances of sons going abroad, or of daughters being married during the subsistence of a marriage wherein conquest is provided. Were it otherwise, a father must only give payments in part to his children, and so leave law-suits behind him, both as to the right of the child who gets, and of the child who does not get the provision.

On the 26th July 1768, The Lords found that the words of Mrs Marjory Sinclair's contract of marriage, in 1748, import a renunciation and discharge of the half of the conquest provided to her by her father's contract of marriage in 1722; and, consequently, must restrict her sister Katherine's share of said conquest to the other half, and, therefore, prefer the heirs of line of Southdun to that share of the conquest now in question, which would have fallen to Marjory, if she had not been excluded by her contract of marriage.

On the 25th November 1768, they adhered, altering Lord Auchinleck's interlocutor.

Act. G. Wallace, A. Lockhart. *Alt.* D. Rae, R. Dundas. *Diss.* Auchinleck, Barjarg, Monboddo, Strichen, Alemore, (not present at last hearing.) President, Kaimes, (*non liquet* at last hearing.)

1768. December 1. ROBERT ARTHUR *against* MESSRS HASTIE and JAMIESON.

SALE.

Interest of consignee in goods shipped to him from abroad, and of which the bill of lading has been transmitted to him.

[*Faculty Collection, IV. p. 165; Dict. 14,209.*]

MONBODDO. I doubt as to the principle of the interlocutor and its consequences. The goods were put into the hands of the shipmaster, in order to be delivered to the Glasgow merchants; still, however, on the risk of the Virginia merchant: but the rule, *res perit suo domino*, admits of various exceptions. Supposing no transfer of the property, the consequences drawn in the interlocutor will not hold. If I have a personal right to a subject, and no more, still this will be a burden on the subject after arrestment.

PRESIDENT. No arrestment can carry the property of another man.

GARDENSTON. If remittances of goods by foreign merchants were liable to arrestments, the consequences would be dangerous. I wish for an inquiry into the practice of other nations, especially England. I hold that a consignment of goods for payment is, in reality, an assignation. If there had been a formal conveyance and assignation, there would have been no question; though, in strictness of speech, the property was not thereby transferred. I do not see the difference between that case and the present.

PRESIDENT. That hypothesis is not consistent with the tenor of the contract between the parties.

GARDENSTON. I do not go upon that contract, but upon the bills of loading and the letters.

BARJARG. This private contract cannot have effect against the diligence of third parties. There was no antecedent obligation on the Virginia merchant.

PRESIDENT. It would be dangerous to alter this interlocutor : it would be opening too wide a door for frauds and undue preferences.

KENNET. The tobaccos were not the property of the Glasgow merchants, and would not have been their property, even if they had been delivered. The case of *M'Farlane* was different from this ; for there he had previously wrote home to a trustee that he was to send the goods for payment of his creditors.

On the 29th November 1768, The Lords found that there was no sufficient evidence that Archibald Dunlop was divested of the ship and cargo, in favour of Hastie and Jamieson, and, consequently, that the same was liable to be affected by the diligence of his creditors; and, therefore, preferred Robert Arthur upon his arrestment, "adhering to Lord Pitfour's interlocutor."

Act. R. Cullen. *Alt.* A. Lockhart.

Non liquet, Monboddo.

Vide infra, 1st March 1770.

1768. December 1. CREDITORS OF GEORGE PITCAIRNE against SAMUEL FOGGO.

USURY.

A commission of a half *per cent.* may be charged by Bankers.

[*Dictionary*, 16,433.]

MONBODDO. If Foggo's debt is good, so also is his diligence. *A pari passu* preference has an appearance of equity, but we have no power to create it.—My doubt is upon the statute against usury. I am glad that the pursuers have passed from penalties ; but they insist that the debt itself be set aside, upon two grounds : 1. The charge of commission. 2. The charge for drawing and re-drawing. If a man, under pretence of commission, or other practice, takes more than five per cent. he is within the statute of usury. The merchants, in their report, have made a distinction which I cannot make, between bills and accounts. A banker's profit is great without commission ; he lends at five per cent. while he borrows at four per cent. The charging Pitcairne with the expenses of drawing and re-drawing is also usurious.

AUCHINLECK. My brother is too Jewish in his notions of usury. Transactions among merchants are carried on in a different form from those of other men and the rest of the world. It is absolutely necessary, for carrying on transactions in trade, that there be something of the same nature as here. Many people have a great benefit by this method of dealing ; business cannot be carried on without it. It enables men to borrow no more than they have occasion for, and to pay in sums, however small. The commission here, in the in-

tercourse of many years, is but £30. It would have cost Pitcairne more had the money been got from a money-broker. As to drawing and redrawing, that is already cut off by the Lord Ordinary. The case, as to that, was formerly tried between *Ochterlony*, and *Hunter of Polmood*, a cautioner, and unanimously found not usury. I could find this usury, when fraud appeared; but *here* no fraud.

PITFOUR. One detests a creditor who takes advantage of a debtor: one equally detests a debtor who takes advantage of a creditor. This point of commission is of great consequence. Upon its commerce, in its infant state, depends. To exact money for labour, is not usury. There may be an excess, but an excess may be corrected. Too high price for labour happens when there are few hands employed:—No danger of this in Edinburgh, as to bankers, whose number is so great. I see no reason for striking off the charge on account of drawing and redrawing, unless Foggo had given it up; for it was calculated for the benefit of Pitcairne.

KAIMES. Drawing and redrawing is wrong in its consequences; but can never cut down the debt or the account. As to commission, I tremble for the consequences to the trade of this country, were commission to be cut down. Some years ago, there was only one banker in Edinburgh, and he did not circulate above £50,000; now there are many, and one circulates £50,000 *per annum*. This is owing to cash accounts, on which commission is given. I have no idea of cutting down, as usurious, when a man does no more than what every man has done for 30 years.

ELLIOCK. I never understood that there was such a money-lending business any where but in Edinburgh; it is different from that of a banker or remitter of money. It is something like the trade of pawn-broking, which has been checked by many statutes. There has been a practice of taking commission established for 25 or 30 years. I would not cut down the debt, but would strike off the claim for commission.

PRESIDENT. It is impossible that drawing and redrawing can be usury, after the decision of *Ochterlony*. As to commission, neither is that usury; but, at the same time, I think that the account ought, in so far, to be corrected. I do not like this money-lending branch of business; it is merely a trade of dealing in money. Private bankers open cash accounts in imitation of the public banks; but they take commission which the banks do not: Thus, 20 or 30 *per cent.* may be gained in a year. I do not see that this trade prevails in any country but Scotland. I do not see that it benefits trade: it must exhaust the profits of all merchants and mechanics. We are not to look to consequences: we must determine by the law. There may be a benefit to trade from borrowing at the rate of 10 *per cent.*, on particular occasions; but this the law permits not.

PITFOUR. The borrower does not in effect pay 5 *per cent.*; for, according to this practice, he may draw interest for the smallest sums, whereas, in the common way, he must always keep his money dead from term to term.

GARDENSTON. If you find that commission is illegal, the bankers in Edin-

1768. December 14. JOHN COLTART *against* JOSEPH FRASER.

THIRLAGE.

A clause *cum molendinis et multuris*, in the *tenendas* of a charter from a subject, operates a discharge of Thirlage.

[*Faculty Collection, IV. p. 147; Dictionary, 16,058.*]

AUCHINLECK. In a charter granted by a subject, there is no reason for making a difference between a dispositive clause and a clause in the *tenendas*. In a Crown-charter there is; for the Barons of Exchequer, though improperly, allow the writer of the charter to fill up the *tenendas* clause without observation or check. But a subject superior is supposed to have read over every word of the charter which he grants. The only difficulty is from the decision in the case of *M'Nab*. In that case, the Court was equally divided, and it was determined by President Craigie's casting vote. On the reclaiming petition, he changed his opinion; but, one of the Judges in the minority happening to be absent, the casting vote of the President could not be taken.

PITFOUR. I admit that *M'Nab's* case was narrowly determined, and therefore I do not lay great stress on that decision; *origines sunt repetendæ*. There is a great difference as to the import of a grant in the *tenendas* in a charter from the Crown, or in a charter from a subject. Such a grant in charter from the Crown is nothing. From a subject it is something; but it is scarcely sufficient to import a liberation from thirlage. The clause may mean, a grant of mills on the ground, or a power of building mills, or a liberation from thirlage. Which of those three is meant, must be gathered from circumstances, must be explained *rebus ipsis et factis*. When the vassal, notwithstanding the charter, still goes to the superior's mill and pays intown-multures, that acquiescence, on his part, proves *quid actum et tractatum*. If the vassal had, by writing, so declared his meaning, this would have been sufficient for establishing astriction: And why should a declaration *rebus et factis* have less force. The judgment of Lord Stair is decisive: as to that decision, which is the first in Dirleton's Collection, it is differently stated by Lord Stair, and we must suppose that the Court did, in that case, first pronounce in favour of the clause *cum molendinis et multuris*, and then against it.

On the 14th December, 1768, the Lords sustained the defences, and assoilied from the multures demanded; altering Lord Coalston's interlocutor.

On the 9th March 1769, adhered.

Act. Ch. Brown. *Alt.* D. Armstrong.

Diss. Justice-Clerk, Pitfour, Barjarg, Stonefield, Hailes. Alemore and Coalston absent.

1768. July 6. MAJOR-GENERAL IRVINE *against* JOHN ADAMS.

MEMBER OF PARLIAMENT.

By 2d Geo. II. cap. 24, sect. 9, *junct.* sect. 2,—Any person guilty of Bribery, by accepting money, or other reward, for his own vote, or by corrupting others, shall, for each offence, forfeit the sum of L. 500 sterling; “To be recovered, with full costs of suit, by Summary Action or Complaint, or by Prosecution before the Court of Justiciary.” *Found*, That, in a complaint to the Court of Session upon this clause, the Respondents were not entitled to insist that a list of witnesses, to be adduced, should be exhibited, or the writings to be founded on produced with the complaint, as would have been the case had they been prosecuted before the Court of Justiciary.

[*Dictionary*, 8884.]

PITFOUR. By the statute, every Court is left to determine in its own form. In criminal cases, a list of witnesses is necessary; because diets are peremptory, and because parties may *in initio* take a precognition, and so have it in their power to come prepared to say by what witnesses they can prove.

COALSTON. When crimes are tried before the Court of Session, it is expedient that witnesses be named, in order to prevent frivolous complaints or vexatious inquisitions. In the case of forgery, the practice is to give in a list. At the same time, what is pleaded for Mr Adams, ought not to be held as dilatory: The cause may go on whenever the list is given in.

AUCHINLECK. The complaint directly charges a contract in writing, for the purpose of bribery: this is the best of all proofs. To what purpose, then, give in a list of witnesses? Why go out of our common road in a case of this kind?

PRESIDENT. It may be expedient to give a list of witnesses after the answers appear; but there is no occasion for serving the complaint and a list of witnesses *simul et semel*.

ALEMORE. This complaint is not a criminal action; it is an action for penalties. The statute, speaking of the method of proceeding in England, mentions *bill of debt*. This shows that the action is not in the criminal form. The Act 1621 says, that the granter of certain deeds shall be infamous; and yet, in a prosecution on the Act 1621, a list of witnesses is not required to be given in. The practice, in the trial of forgery, does not apply; for forgery is directly a crime, and the punishment may be capital.

BARJARG. I incline for a list of witnesses, because a fine is concluded for, and because a man's fame may be affected by the issue of the prosecution.

KAIMES. Shall we oblige the pursuer to give in his list of witnesses before the other party opens his mouth, or says that he is not guilty?

JUSTICE-CLERK. It is not necessary to inquire into the nature of this action, whether criminal or not. It may be understood as criminal, because triable before the Court of Justiciary, and as civil, because triable before the Court of Session: it must be tried according to the form of each Court. As

to the analogy from the case of forgery,—forgery was tried, of old, in the form of an action of improbation, and then no list was necessary. It might still be tried in the same form ; but the practice is for the advocate, out of humanity, to insist, *per modum simplicis querelæ*, and to give out a list.

GARDENSTON. I am against a list ; for I am against all innovations : Specious reasons may be assigned for innovations ; but we cannot foresee their consequences. We are allowed to try, by summary complaint : why not try it like other summary complaints ? If forgery trial is to be the rule, we ought to examine the witnesses in presence, and we ought to oblige the parties to attend.

On the 6th July, 1768, the Lords repelled the defence, and ordained both dilatory and peremptory defences to be given in, this day seven-night.

Act. D. Rae. *Alt.* A. Crosbie.

Diss. Barjarg, Coalston.

1769. January 17. ANGUS SINCLAIR *against* JAMES HAMILTON, JOHN MACFARLANE, and OTHERS.

PUBLIC OFFICER—REPARATION.

Malversation of Justices—Poinding by an officer of excise, in virtue of their decret.

[*Faculty Collection*, IV. p. 194 ; *Dictionary*, 13,180.]

PITFOUR. If the decret is in terms of law, it is not liable to reduction : but then the question is, Whether the justices acted in terms of law ? We ought not to catch at every irregularity committed by justices of the peace, if, however, they act within some bounds of law. They are judges appointed, *ex vicineto*, for the benefit of the subject, who would otherwise have been judged by the Court of Exchequer. They ought to be favoured whenever they can be favoured : but here their whole conduct is irregular. I will state some of the most striking particulars : There was no proof in writing, which is always necessary when a judgment is subject to review. If custom can sanctify this, still the party must be allowed to prove that the evidence was other than what the justices suppose it was. *2d*, There is a difference in the manner of stating the fact ; from whence it cannot with certainty be known whether the offence was prescribed or not.

GARDENSTON. I am not much moved with objections in point of form. When there are hundreds of little causes before the justices of peace, it is impossible to take down, in writing, the evidence, and every thing that passes. I see nothing against the justices ; but I see great irregularity charged against the officers,—that they beat Sinclair, and that they made irregular distress. It is said that the officers had a writ of assistance, and thereby got into the house. I do not know how far a writ of assistance does go ; but I know how

brought a reduction of the above contract on the head of minority and lesion. But the Court repelled the reasons of reduction. The following opinions were delivered :—

PITFOUR. I doubt as to the validity of the marriage-contract. It is a post-nuptial contract, whereby a husband, as curator to his minor wife, authorises her to make a bargain with him. The law would have taken little care indeed of minors, if it had not taken this care of them. Wives under age would be injured in their family interests by such deeds ; as, for example, if the wife died before majority, her heirs would be cut off without redress.

KAIMES. Although the husband and the wife enter into a contract, like the present, yet the husband does not act as curator. The only question is, Whether there is any lesion ? I see none : every thing was fair and rational.

PRESIDENT. It is not only expedient but necessary that contracts like that in question be executed. For, how are settlements to be made in the case of minors marrying without a previous marriage-contract. This often happens from accident, and may from necessity. According to the argument here maintained, a minor marrying without a contract can execute none till she is of age, which is an event distant and uncertain. When a contract is executed in such circumstances, it cannot be otherwise executed than as in the present case. I deny that a wife is so far *sub cura mariti* as that every deed done by her and her husband must be held void and null. It would require more arguments than I have heard to convince me that a woman between 14 and 21 is incapable of making a settlement with her husband. There is no decision as to this, for the thing was never doubted. I know, by experience, that President Dundas and President advised a postnuptial contract of the same kind where a minor lady was concerned. They thought so little of the objection, that they saw no occasion to postpone the marriage for a day till a quorum of the lady's curators should be got to consent to an antenuptial contract.

On the 24th January 1769, “ the Lords repelled the reasons of reduction,” and adhered to the interlocutor of Lord Stonefield.

Act. R. M'Queen. *All.* J. M'Laurin.

Diss. Pitfour. *Non liquet*,—Strichen and Monboddo.

medium. The want of a jurisdiction for the recovery of small debts was sensibly felt in England. Upon an application from the town of Colchester, an Act was obtained, erecting a court of conscience there; and, in imitation of this, 40 courts of the same kind have been since established in different places by Act of Parliament.

[*Query*, Does not this point out the remedy of the inconveniences arising from a defect in jurisdiction?]

GARDENSTON. One thing is clear, that the Justices have no legal jurisdiction in this matter. Public expediency and utility is a dubious topic. Every county is not possessed of a man of knowledge and abilities who will amuse himself in determining small causes. We have an incomparable institution for the distributing of provincial justice,—the Sheriff-courts. What occasion, then, is there for extending the jurisdiction of the Justices of Peace?—And if we extend it, Where are we to limit it?

PITFOUR. Here is a struggle between expediency and law. I approve much of the institution of Sheriffs; but, in order to determine all the claims for small debts in different quarters of the country, many more Sheriffs would be required than the law has provided: Sheriffs cannot be everywhere. I see many jurisdictions founded upon usage,—I see the jurisdiction of the Justices of Peace already extended by usage. The law says, that they shall fix wages; usage says, they shall judge upon actions for wages: the law says, they shall inquire as to fornication; usage says, they shall judge as to the aliment of bastard children. If a Justice of Peace goes too far, there are remedies, by appeal to the Quarter Sessions or by suspension in this Court. As to prorogation, I admit that *non datur prorogatio de causa in causam*; but there may be a prorogation *de summa in summam*. As the subject in controversy does not exceed any ordinary servant's fee, I think to that extent the jurisdiction may be prorogated.

MONBODDO. The difficulty is, Where shall we fix the boundary? This is well determined by Lord Pitfour, to the extent of servants' wages and aliment of bastard children.

PRESIDENT. In the last determination upon this point, the Court was equally divided. No better interpreter of law than custom. To find that the Justices have no jurisdiction, would have the effect of introducing confusion. As a Justice of Peace, I always judged in those small causes, and so did Lord Arniston before me:—He thought that a jurisdiction might be established by usage. Were the Justices of Peace to go too far, or to judge on bonds and the like, the Court would interpose; but, in a small debt, in a *negotium rusticum*, they may judge. They are presumed able and intelligent; for the law has given them the power of judging in many cases, and that without appeal.

On the 24th January 1769, "The Lords found the Justices were competent judges, and therefore found the letters orderly proceeded."

Act. J. Boswel. *Alt.* D. Dalrymple. *Reporter*, Justice-Clerk.

Diss. Gardenston, Barjarg, Elliock, Stonefield, Hailes.

HAILES. The door could not be opened without some degree of violence. It was so little intended for opening from the outside, that, being opened as it was, the poinders could not have shut it again : Had there been a flock of sheep in the yard, instead of a cargo of deals and logs, and had the poinders paid themselves by pointing one sheep, it is plain that all the rest of the flock must have been scattered over the country ; for there was a fence broke down, which no one from without could have repaired ; and, therefore, the poinders must either have locked themselves up or set the sheep loose. That the yard contained logs and not sheep, will not vary the determination in law. I cannot see how the act of the messenger can be more legal in this case, than if he had used a ladder to get over the rail, executed the pointing, and then returned by the way he got in.

KAIMES. Lock or no lock makes no difference. The old law of Scotland is, that every man must be at peace within his own home : no man must break into another's house without authority. He who is possessed of letters of caption may break into a house, for caption is supposed to be executed only against those who are in open rebellion ; but here the question is as to a yard, not to a house.

AUCHINLECK. Suppose the case of a workhouse : If locked, there can be no access without letters of open doors. There is a specialty here : the door was not locked, but closed in the inside. Suppose the messenger had drawn out the nails, this would have been a more legal entry : he might then have put every thing in *statu quo* ; but here he could not shut the gate if once opened.

PITFOUR. If a messenger finds an open door, he may come in and execute his letters ; but he cannot use force, less or more, to make open a place that is shut. The right of securing every man's property, respects out-houses as well as dwelling-houses.

PRESIDENT. A man's warehouse for timber is as much railed in and closed up as any other workhouse. There is nothing in law or practice which authorises a messenger to make good his entry when there is opposition of any kind, unless he has letters for open doors.

JUSTICE-CLERK. I cannot distinguish between this case and an entry into an inclosure for cattle, where carts or stakes happen to be placed against the gate to prevent the issue or entry of cattle.

On the 25th January 1769, the Lords assoilyied from the reduction, altering Lord Barjarg's interlocutor.

On 2d March, adhered.

Act. D. Rae. *Alt.* A. Lockhart.

Diss. Strichen, Pitfour, Auchinleck, Barjarg, Hailes, President.

Non liquet, Monboddo.

At the second hearing, Auchinleck was for the interlocutor, as also Monboddo, who had been *non liquet*. Kaimes was against it conditionally, for the sake of his darling *pari passu*.

they could show that the penalties stipulated in these bonds are truly not sufficient for that purpose: But, *2do*, that, whatever may be the amount of their expenses, and loss from delay of payment, they have a right to draw their penalties, as well as the rest of their debts, in virtue of their adjudications: that the restriction of penalties on personal securities, where no adjudication has been led, is foreign to the point in dispute; because it is the adjudication which establishes the creditor's right to draw the penalty out of the lands adjudged, as an indemnification not only for his expenses, but for the inconvenience of lying out of his money: that this is consistent with the statutes referred to, as penalties are truly sums to which the *damage and expense* of the creditors are liquidated by agreement: that the practice of adjudging for penalties, and recovering them out of the lands, has been established for above a century: that, at one time, it was even the practice, in leading a general adjudication, not only to accumulate the penalty, but also to adjudge for a fifth part more, as in a special adjudication: that it was necessary to pass the Act of Sederunt, 26th February 1684, to correct that practice: that the decisions cited do not support the doctrine rested upon them,—the adjudication having been restricted, in the case of *Wiseman*, on account of nullities which left the Court at liberty to restrict it; and there were also specialties in the case of the *Creditors of Sutherland*.

The Lords “found that, in this case, the penalties cannot be restricted.”

Diss. Pitfour, Kaimes, Strichen. (Kaimes because creditors concerned.)

The following opinions were delivered:—

AUCHINLECK. Penalties were added to obligations in order to enforce performance: hence, they were anciently stipulated to be paid for the reparation of such and such a church, and therefore could not be restricted by the parties: but this practice has been mitigated in later times. In the case of *Joseph Allan of Castlebrocket*, the Court, from considerations of equity, restricted a penalty to neat expenses. In adjudications, penalties are accumulated, because the Court thought this necessary for answering expenses after adjudging. As to the case of *Sir Hugh Hamilton*, I do not think that the Court proceeded upon any nullities in the adjudication: the specialty was a most rapacious demand by Sir Hugh. There the adjudication was taken when little interest due, and the payment was demanded immediately after. But, when a man is put to the necessity of adjudging, and his claim hangs on unsatisfied for 30 years, there the equity of restricting dwindles away. A proportion of penalties cannot be granted, for the right that is in the creditors is a right upon the principal sum, and the penalty relates to it.

MONBODDO. I can adjudge for principal, sum, and penalty, although no interest be due. How can the court restrict what the law allows? A penalty is a liquidation of the *interesse*. The civil law is the only system of equity that I know; it is the *Prætor's edict* commented upon by the Roman lawyers. By it, if the *interesse* was liquidated by consent of parties, the judge could not interpose to diminish it.

KAIMES. Penalties are daily restricted in practice; as in the case of *Sir Hugh Hamilton*, which was determined upon plain rules of law,—*Nemo debet locupletari aliena jactura*, and that diligence must not be used *in necem debitoris*. Here there was a loss rather than a gain by the adjudication. But then we are not to consider accidental damages: no sum can be demanded but what is actually laid out. If we adopt any other rule, we shall embarrass ourselves in our decisions.

JUSTICE-CLERK. In the case of *Sir Hugh Hamilton*, there was no good objection to the adjudication; I was a lawyer in the cause, and endeavoured to show objections, but could not. In that case there was strong equity. The law lays down a rule not to be departed from, unless in order to bring in equality between man and man. Whenever exorbitant penalties are demanded, I am ready to exert Prætorian powers; but here I see nothing exorbitant,—rather the contrary. It never could be the sense of the statute that penalties were to be ascertained precisely by the neat expenses laid out.

GARDENSTON. In personal obligations, penalties are always restricted to expenses: But, as to real obligations, the law has made a difference by statute 1672: A creditor, regularly, and *de jure*, is entitled to penalties. If I saw a case so circumstanced as that the penalty was exorbitant, I might restrict it; but I see a rule established, and no reason for departing from it here.

PITFOUR. Penalties might be restricted, as in the case of *Panmure, Sir Hugh Hamilton, &c.*

PRESIDENT. I am clearly of opinion that the court may interpose, and restrict both in bonds and in adjudications: but then this must not be gone into, in consequence of accounting: there must be a glaring equity: that rule does not apply here. When a creditor is not regularly paid, when the penalty is not great, and when some expense has been incurred, I cannot go into calculations in order to restrict the legal penalty.

On the 1st February 1769, The Lords found, “that, in this case, the penalties cannot be restricted.”

Act. A. Lockhart. Alt. D. Rae. Reporter, Gardenston. Diss. Pitfour, Kaimes, Strichen; [Kaimes, because creditors concerned.]

1769. February 7. CAMERON and FARQUHAR, Merchants, London, *against* WILLIAM WATT and COMPANY, Merchants in Kirkwall.

ARRESTMENT—FOREIGN—MULTIPLEPOINDING.

A. of London, arrested, in the hands of B in Scotland, a sum due by B to a debtor of A. Afterwards, B being in London, his person was attached by the assignees of the common debtor, and he was compelled to find bail to appear in an English Court. A furthcoming being brought by A, *found* that B must pay the sum arrested, to him, and that he was not bound to find caution to relieve B of the English attachment.

ANDERSON, a merchant in London, was indebted to Cameron and Farquhar. Anderson failed, and a commission of bankrupt was issued against him. Cameron and Farquhar arrested, in the hands of Watt and Company, merchants in Kirkwall, a debt due by them to Anderson, and brought a forthcoming. Watt and Company raised a multiplepoinding, and stated that they were ready to pay the debt, but that, since the arrestment of Cameron and Farquhar, one of their partners, John Watt, happening to be in London, his person had been attached, at the instance of the assignees of Anderson the bankrupt, for payment of the debt in question: and he had been compelled to find bail to present himself in an English court. It was further stated, that the assignees had refused to withdraw their attachment, although notice had been given them of the previous proceedings in Scotland, in which they might have appeared for their interest. It was therefore insisted, by Watt and Company, that, before decree of payment could be pronounced in favour of Cameron and Farquhar, they should be ordered to find caution to relieve them of the English attachment, and its consequences. The Lords, however, refused this, and “preferred the arresters without caution.”

The following opinions were delivered:—

AUCHINLECK. As the arrestments in Scotland are prior to the attachment of John Watt's person in England, we cannot regard that attachment, but must go on in giving execution to the diligence of our own law.

MONBODDO. The arresters should find security to indemnify the debtor, if he is obliged, in consequence of the attachment, to pay the debt at London.

PITFOUR. Debts due by a company in Scotland are Scots debts, and affectable in Scotland; and, therefore, this arrestment is a good diligence, and we must enforce it. There can be no doubt as to the preference: but here is a new circumstance not hitherto determined, namely, an attachment of the debtor in England, after the date of the arrestment in Scotland. There are principles to determine this: *Exceptio rei judicatæ* is good all the world over: so it was found in the case of *Captain Hamilton* against the *Dutch East India Company*, where a payment, in virtue of an unjust decree of the Court of Batavia, was found to afford a good defence against second payment. The courts in Eng-

land will certainly follow this rule, and not find Watt liable for money already arrested in his hands by the course of law. As to finding security, I do not relish it. We are not to take notice of what happens in another country : The ordering security to be found would look as if we were doubtful of our own powers ; and might be so held in England : this might afford an argument for the English judges to find the attachment effectual.

KAIMES. Here is my difficulty : Had the debtor paid to the assignees before the process came on here, his *bona fides* would have exempted him from second payment. But now there are two attachments at once ; one in this country, one in England. Shall we ordain this man to pay here, and, at the same time, leave him to pay again in England ?

PRESIDENT. There is a regular arrestment and a forthcoming. How can we suffer goods to be drawn out of this country by means of the accident of the debtor being attached in England ? It is said he may pay twice. No : I will not suppose that judges in England will do otherwise than we ourselves would do in such a case : We would set the man at liberty. To make him pay twice would be a monstrous injustice. I cannot doubt of his defence being found good. It is below the dignity of this court to make the creditor-arrester find caution. The ordering caution to be found would give a handle for misleading the English judges to do wrong.

GARDENSTON. Arrestment and forthcoming are equivalent to payment ; and we can never suppose that the English judges will disregard the legal defence of payment.

On the 7th February 1769, "The Lords preferred the arresters without caution."

Act. J. Douglas. *Alt.* A. Crosbie. *Reporter*, Stonefield. *Diss.* Kaimes ; and, as to not finding caution, Monboddo.

1769. February 10. THOMAS DUNDAS of Fingask against MRS AGATHA DRUMMOND of Blair.

[*Faculty Collection*, IV. 335 ; *Dictionary*, 15,035.]

WARRANTICE—SUPERIOR AND VASSAL.

Heir of one selling with Procuratory and Precept, not bound to enter with the superior.

AUCHINLECK. I have always considered that when a man sells an estate, with an obligation to infest, *a me*, or *de me*, and, for this purpose, grants procuratory and precept, that this is a good and regular obligation ; but, as soon as he grants the procuratory and precept, he is *functus*, and the disponent has right to use either the one or the other. If the disponent had not a complete title, there is recourse against him ; but, if he had, he has no farther concern. Why should we oblige a disponent to keep up lands in his rights after he has sold

them? According to Mr Dundas's argument, he ought to continue the lands in his charters, were it for 500 years. The present question is of great moment to the land rights in Scotland. If this were an estate held of the crown, the argument would be the same; and thus Mrs Drummond would be obliged to take out a charter from the crown for the single conveniency of the vassal: and this obligation might often recur, to her great detriment and expense, without any possibility of advantage.

PITFOUR. The reason of the obligation to infest, and of the warrandice, is in case the disponent happens not to have a full right to the lands.

MONBODDO. It seems to be admitted that Mrs Drummond might enter if she pleased. The question is, Whether does the warrandice oblige her to enter? If Mr Dundas had a precept, and no procuratory, he might have compelled Mrs Drummond to enter. Why should his right be diminished by having both procuratory and precept?

PRESIDENT. When there is only a precept, there remains a superiority,—a real estate in the superior; but, when there is a procuratory, there is a right defeasible at the will of the vassal; and this makes the difference.

GARDENSTON. Had this method of disappointing the superior been lawful, it would have been discovered long ago.

On the 10th February 1769, "The Lords found that Mrs Drummond could not be obliged to enter with the superior, and therefore assoilyed, and found expenses due;" altering the interlocutor of Lord Monboddo.

Act. H. Dundas. *Alt.* R. M'Queen. *Diss.* Monboddo. He was much hurt with this interlocutor: he said to me, "Will you leave us no law?"

1769. February 10. JOHN BADENOCH against GEORGE, &c. KELMANS.

MINOR.

Decree having been pronounced against a Minor having a tutor, and the reclaiming days having, through negligence, been allowed to elapse—*found* that the Minor was not entitled to be reponed on the head of minority and lesion.

JOHN Badenoch was a minor, having a tutor. In a process, at the instance of Kelman, against him, the Lord Ordinary, after pleadings, both *viva voce* and written, upon the merits of the action, in which the minor's pleas were fully stated, decerned against him. A representation was prepared against this interlocutor, but it was omitted to be lodged until after the lapse of the reclaiming days, and was, in consequence, not received; and the decree was extracted. In a reduction of this decree, at the instance of the minor, it was

PLEADED,—The pursuer has no occasion to maintain that, where a minor's cause has been fully and fairly heard, and a decree has been pronounced, which has become final, minority affords any reason for opening up the decree: But he maintains that minority is a good reason for restoring a party against the

lesion he sustains by the fault of his tutor, or agent, as this truly arises from his nonage; seeing it is to be presumed, that, if he had been major, and capable of attending to his own affairs, he would not have allowed the reclaiming days to expire without representing. *Gordon* against *Earl of Queensberry*, 15th June 1680; *Logie* against *Keir*, 20th December 1699; *Cockburn* against *Haliburton*, 10th February 1672; *Alexander* against *Pack*, 14th January 1697; *Lady Balgerno* against *Lady Ross*, November 1683. Bankt. 2,679.

ANSWERED. It may be doubted whether the privilege of minority extends to the reponing, even on the ground of competent and omitted; *Oakly* against *Telfer*, 22d January 1675. But it is unnecessary to argue this, as the grounds on which the decree is attempted to be opened are not *competent* and *omitted*, but were actually *proponed* and *repelled*.

“The Lords found it not competent for the pursuer to insist for an alteration of the interlocutor of 3d March 1767, as the same was not complained of within the reclaiming days.”

The following opinions were delivered :—

PITFOUR. The Roman law allowed *restitutio in integrum* to minors if lesed. *Si non provocavit intra diem* is one of the cases there put. Our law gives another sort of remedy: competent and omitted is always allowed to be set aside in the case of minors. The highest certification is that in the House of Lords, if an appeal is not brought within five years: from this certification minority is exempted. The defenders would undoubtedly lose their cause upon the merits, were it to be tried in the House of Peers: for the interlocutor is precisely the reverse of the judgment of the House of Peers, in the case of *Skirvan*; and that House is always uniform in its judgments. Such would be the case were the pursuer rich enough to carry the cause there; and I should be sorry were the case of the poor to be different from that of the rich.

KAIMES. Lord Pitfour has spoken properly as to competent and omitted. I wish he had also spoken to the present case, which is proponed and repelled, with an extracted decret.

MONBODDO. I would wish to be relieved of the *res judicata*, because I am satisfied that the judgment on the merits of the cause is erroneous. With respect to competent and omitted, that plea is disregarded in the case of a minor; because, there, the judge has given no decision upon the minor's plea, which was never before him. But I always thought that a decree, repelling an allegation, cannot be reduced, however unjust. A minor is in no better situation than any one else. Were there to be any other rule established, there could never be a final judgment against a minor.

AUCHINLECK. The maxims of law are plain. *Res judicata pro veritate habetur, et vigilantibus jura subveniunt*. Let the minor have recourse against him who neglected the cause. But, after a point is stated and judged of, can another lawyer come in and say, “Hear me, for I will plead the cause better?”

PRESIDENT. If you sustain this plea of minority, you will, in all probability, set aside the bulk of decisions pronounced in this Court. By the same rule you may hear a minor after two subsequent interlocutors; and if, after two, why not

after twenty? He has the benefit of a review in another court: let him use that benefit. There is a difference between a court reviewing its own final decree and another court receiving an appeal after the *dies fatales*.

GARDENSTON. A minor is entitled to be restored where a tutor has injured his right by neglect. There was such a neglect here,—an overly pleading and not so much as a representation offered against the judgment. If the tutor had taken the opinion of the whole Court, he would have been exauctorated, and the minor would have had no pretext for restitution.

BARJARG. When a minor is injured from the circumstance of minority, he may be restored; but, if he is not injured from that circumstance, there is no remedy. The law does not favour minors more than others. The minor was *defensus*, for he got a judgment in the cause. If he has been *male defensus*, his recourse lies against his tutor.

KAIMES. Why should we extend the privileges of minors to the hurt of all the rest of the world? By the rule now sought to be established, a minor may bring as many appeals as he pleases, and may drop them as often as he pleases.

On the 10th February 1769, “the Lords found it not competent for the pursuer to insist for an alteration of the interlocutor of the 3d March 1767, as the same was not complained of within the reclaiming days;” adhering to Lord Gardenston’s interlocutor.

Act. D. Græme. *Alt.* A. Elphinston.

Diss. Strichen, Pitfour, Gardenston.

1769. February 11. JOSEPH CLARK and OTHERS against MR ARCHIBALD HOPE.

COALLIERS.

May be employed at any Coal possessed by their master.

[*Faculty Collection, IV. p. 337; Dictionary, 2362.*]

KENNET. All the different coals are existing; neither are any of them deserted. A master may aliment his coalliers in the interim while his works are interrupted. What should hinder him to aliment them by employing them in a work which is not more dangerous, nor less lucrative, than the work to which they are engaged?

MONBODDO. This is a point already decided, and well decided. There is no argument on the side of the coalliers, but the opinion of some lawyers, who compare coalliers to the *adscripti glebæ* of the Romans, and the *proprii homines* of Germany. What was the condition of those persons I do not well know. I think they are a relict of the *nativi*; which was the state of great part of the lower sort in Britain in former times. The *nativi* were not *adscripti*

glebæ by any means, not even the *villani*, who were a species of the *nativi*. There is no authority from the statutes to suppose that coalliers are *glebæ adscripti*. Our ancient constitution, which allowed of slavery, was better than our modern constitution, where the commons have too much liberty : we see this in our neighbouring kingdom ; I hope we shall not feel it here. Formerly there were no *liberi homines* but the king's tenants, men of education, and of the noblest profession, that of arms ; and in their hands was the power of the state.

HAILES. This is very learned and ingenious. But we ought to satisfy ourselves with determining the cases that come before us. I am of Lord Kennet's opinion, and for the reasons given by him.

PRESIDENT. Abstract points are to be avoided. It is dangerous to treat of them, as wrong inferences are sometimes drawn from them by bystanders. I must, however, observe that it is wrong to talk of coalliers as slaves. A coallier is not a slave, though bound to work at a particular work. No man can sell his coallier any more than he can sell his bound servant. The single point is, When a master has two coals, may he transpose the coalliers from the one to the other, if the one coal is as convenient as the other ? I think he can : but he cannot sell, neither can he transfer his title to another man. Where there is a hardship, the law will give redress ; but here there is no hardship.

ELLIOCK. As long as the master has work for the coalliers, so long must they work for him.

PITFOUR. In a question of liberty, we must incline to that side. If a coal is wrought out, the coallier may be at liberty to go where he pleases. There is no inconveniency in this, no licentiousness, for he will still work for wages ; but, from the circumstances of the present case, I am of Lord Kennet's opinion.

GARDENSTON. I am a friend of liberty, but then it is of liberty according to law. Coalliers are no slaves. I should be sorry that there was such a creature in Britain. Coalliers are in no respect slaves ; and, if I saw any attempt to oppress them, I would protect them as my fellow-citizens : but here there is no hardship.

On the 11th February 1769, " the Lords sustained the defence, dismissed the action, and assoilyied."

Act. T. M'Claurin. Alt. H. Dundas. Reporter, Pitfour.

1769. February 14. WILLIAM PORTEOUS and OTHERS *against* JOSEPH ALLAN and ALEXANDER MORTON.

SERVITUDE.

The right of a Drove-Road, for the passage of sheep to and from an annual fair, may be acquired by prescription.

[*Faculty Collection*, VI. 170 ; *Dictionary*, 14,512.]

AUCHINLECK. Drove-roads are a great nuisance. They are like mill-roads, when the whole thirle, according to a barbarous ancient usage, assembles to transport a mill-stone. They are like hunter's roads, where *in via nulla via*. The drovers do not desire the use of any high road ; for a high road is hard for the cattle's feet, and produces no grass. They choose to go upon a soft road ; that is, they choose to consume their neighbour's grass. All the country, if uninclosed, is left exposed to their encroachments. Roads are committed by law to the justices of peace. But can they take the charge of repairing what is called a drove-road ? No ;—nor would the drovers thank them for their care. There is no such thing as a servitude of this kind known in Scotland, unless by oppression, like the oppression of gipsies and sorners. Why not go by the high road ? If it is too narrow, why not make it broader ? The case of *Sir John Douglas* does not apply, for there the Court did not find that there was to be both a highway and drove-road ; but it found that the road which Sir John had stopt was the high road.

MONBODDO. If the servitude of a drove-road was a servitude known in the law of Scotland, I might have some difficulty ; but I know no such roads in our books. It seems rather to resemble a servitude of pasturage without a dominant tenement. Here there is interruption sufficient to prevent a right so anomalous ; for, in such case, I would require either an express constitution of servitude, or a total acquiescence in it. The law is thus,—I must drive my cattle by the highway to the market.

JUSTICE-CLERK. A drove-road is well known in practice. It would be of fatal consequence were the Court to find otherwise. Here has been constant and immemorial possession, and no interruption but that of confining the sheep in as narrow a tract as possible.

STONEFIELD. All servitudes are hardships on the servient tenement. If this was a reason against them, there would be no servitude permitted. A drove-road is a thing established in practice, and in this case there is constant possession of such road.

PITFOUR. I am of opinion of the interlocutor in point of law. A drove-road is a road known in law, and must be protected. When we speak of acquiring a road by prescription, where no other road is to be had, I would not much regard interruptions. But, if another road can be shown, I would not establish it by prescription, when there are interruptions.

KAIMES. From the nature of property there must be a road wherever there is a habitation. Drovers must certainly have a road. If they went down through the muir before the decreet-arbitral, they still have a right. When a country is not inclosed, every man takes a short cut ; but there are not as many roads as there are short cuts, for then a country would never be inclosed at all.

PRESIDENT. There are drove-roads in Scotland,—as from Falkirk to Moffat, which is fenced in by a dike on each side ; but when, in an open country, cattle are driven anywhere, this will not establish a road. The practice of driving cattle at large was frequent even in Mid-Lothian till turnpike roads were established and the country inclosed. A drove-road cannot be constituted over the whole face of a country. If there is no other road, a passage must be found : but here there are other roads, and the decreet-arbitral points out one.

On the 14th February 1769, “ the Lords sustained the defences, and assoilied ;” altering Lord Justice-Clerk’s interlocutor.

Act. R. Cullen, R. M’Queen. *Alt.* J. Boswell, D. Rae.

Diss. Stonefield, Justice-Clerk. *Non liquet*, Gardenston.

N.B.—It appears that this interlocutor was afterwards altered. See *Dictionary*, 14,512 ; and *Sup.* V. 598.

1769. February 15. ALEXANDER HOME against DAVID LOCH.

RECOMPENSE—CAPTIVE.

Ransomer entitled to an Allowance in *solatium*.

(*Faculty Collection*, IV. p. 339 ; *Dictionary*, 2025.)

GARDENSTON. This boy was sent upon a trying voyage,—not a sailor,—yet he was singled out as a ransomer. I thought that some *solatium* was due : reason and humanity point at this.

HAILES. There is a plain ground upon which the interlocutor may stand. It is an established rule among captors to take the mate as a ransomer. The French captain could never have deviated from this rule and pitched upon a boy to be the ransomer, unless the master of Loch’s vessel had pointed that boy out as connected with people of fashion. The master acted prudently in this, for he thereby saved his mate : at the same time, this was unjustifiable, according to Loch’s own account, for he charges board for the boy as a passenger. Now, no one ever heard of a passenger being given as a ransomer. I think that Loch is liable for the conduct of the master,—wrong in itself, but useful to the voyage ; and that the sum awarded is not too high.

JUSTICE-CLERK. I am of the opinion last given, for the same reason. The second in command is always taken as the ransomer. This boy could not have been taken unless he had been suggested by the master of the vessel : herein the master acted profitably for Loch, and Loch must be answerable.

PRESIDENT. I have some doubt as to *solatium*. Would inquire whether the boy's friends knew that he was to be sent to Havannah instead of Hamburgh; for, if so, there was a fraud and a wrong, and the *solatium* given would be too small.

On the 15th February 1769, "The Lords found Loch liable in £40 sterling, and in expenses;" adhering to Lord Gardenston's interlocutor.

Act. R. Sinclair. Alt. R. Blair.

1768. *January 8th; and 1769, June 13.* LADY LEITH, and her CHILDREN, against EARL OF FIFE.

REPARATION.

Amount of Assythment.

THIS case is reported by Lord Kaimes, (Mor. p. 13,904,) who has stated the circumstances, and the argument maintained on the question, whether an assythment was due? That question having been determined in favour of the pursuer, it next came to be considered, What sum should be granted in name of assythment?

The following is Lord Hailes's report of the opinions delivered by the Judges on that point:—

HAILES. We have no *data* by which to determine the extent of the assythment. After the Rebellion in 1715, it was proposed to take five years' rent of the estates of those concerned in the rebellion, and to grant an amnesty. May not something of the same kind be done here?

PITFOUR. That proposal came from a friend of Lord Hailes, who did not like forfeitures. It was three, not five years' rent; but I think that five, or even three years' rent, is by far too much. In punishments, both *consilium et eventus* are to be considered. Here there was no premeditated intention of murder; but still there was a man killed, and consequently an assythment is due. The patrimonial loss of Leithhall's family does not affect me, for that loss is not proved.

AUCHINLECK. Anciently, there were regulations or rates for the price of blood, estimated according to the circumstances of the person slain: there was the *kelcher*, (head money,) "*domini regis, comitis, thani, vel rustici.*" In later practice, assythment has been regulated by other principles: the circumstances of the slayer are attended to as well as the rank of the slain. The assythment, here, ought to be moderate, for the slayer has a wife and nine children, and a small fortune.

KAIMES. I must suppose that there was a voluntary killing. The wife and

nine children move me. At the same time, what is due is rather a *solutium* than damages.

PRESIDENT. The situation of the persons claiming an assythment is to be considered; but when those persons are well provided, and in easy circumstances, I would give assythment rather as a sort of revenge than as damages. It is the decree of this Court, rather than the money, which ought to gratify the pursuer.

BARJARG. If the person slain had a liferent office, the assythment would be greater, because the patrimonial loss to his relations is greater. The only evidence of the murder is from the acknowledgment of the defender. The fugitation and escheat are only for contempt of the Court, not any proof of the murder. This circumstance ought to go into the scale in voting the assythment.

On the 16th February 1769, "The Lords modified the assythment and damages to L.150 in whole."

On the 13th June, 1769, altered and modified L.300 in whole.

Act. Cosmo Gordon. Alt. A. Lockhart. Reporter, Barjarg.

1769. February 20. WILLIAM TROOP against EARL of FIFE and OTHERS:

MANSE.

Minister of a Royal Burgh, with a Landward Parish, not entitled to designation of a Manse, upon the Statute 1663.

[*Faculty Collection, IV. p. 136; Dictionary, 8508.*]

HAILES. The pursuer has founded much of his argument upon this, That, before the Reformation, manses were, by the law, to be built by the parishioners. This is a fundamental error, as appears from the 13th Canon of a Provincial Council held in Scotland, 1249, during the reign of Alexander II. It runs thus:—" *Statumus etiam quod quælibet ecclesia mansionem aliquam prope ecclesiam habeat, in quam Episcopus sive Archidiaconus honeste recipi valeant, quam decernimus infra annum debere fieri tam expensis personarum quam vicariorum pro rata suarum portionum. Sustentatio autem domorum spectat ad vicarium cum habeat usum earum et commodum; et ad hoc per sequestrationem fructuum ecclesiarum compellantur.*" My only difficulty here is, that there appears to have been a manse in this burgh. There was a manse in 1649; and, in possession of the eldest minister, there was a manse in 1682;—and, that the manse was repaired after the Revolution, appears from the writings in process. If, then, there did actually exist a manse in this royal burgh, I doubt how far that circumstance does not take the case out of the general rule.

AUCHINLECK. It is a general regulation that ministers are to have manses; but it does not follow, that, if there are many ministers in a parish, each minister is to have a manse. I consider a second or third minister as no more than

an assistant, and not entitled to any manse. As to a manse for the first minister, if the parish consisted altogether of a burgh, he would have no title : but it is a strange doctrine that a minister should have no manse, because a royal burgh happens to be within the parish. In such a burgh, for instance, as New Galloway, where all the houses belong to the family of Kenmure, there must be only one manse, and the ministers must adjust between themselves who is to have it. My only doubt is as to the decreet of modification and locality, where it was urged, that the minister had no manse, and where it is to be supposed that that argument was one cause of granting a very large stipend, little less than L.100 *per annum*.

PITFOUR. The series of the Acts of Parliament, and the judgment of the Court in the case of *Dunfermline*, satisfy me that the ministers of royal burghs are not entitled to manses. There was a specialty in that case, arising from the use of paying house-maill ; but still the general point was determined. Before 1649, heritors had no concern in manses : while the church was opulent, the clergy had no occasion for the aid of the heritors ; but, when the clergy became stipendiaries, they had. The Act 1649 was, with many others, abolished by the Act Rescissory ; but many of those rescinded Acts were, by degrees, restored. The Act 1649 was in part restored by the Act 1663, which has a retrospect to the very day on which the Act 1649 was made ; but this Act, 1663, omits the clause as to royal burghs,—it must have been *consulto* omitted. If there had been any view of a parish, whereof great part was within royal burgh, why did the Act neglect to lay part of the burden on the royal burghs ? When burghs comprehend a very small part of the parish, there may be a difference ; but that is not the case here.

PRESIDENT. The first question is as to the title of the pursuer. I do not think, that, where there are two ministers, there must be two manses. The eldest minister only can be entitled to a manse : the decreet of modification and locality proves this much, that, at that time, 1714, the minister was not understood, in law, to be entitled to a manse.

JUSTICE-CLERK. The statute, 1649, did introduce something into the law which was not law before. The statute 1663, omitting a proviso of that statute 1649, shows that there is a distinction between burghs and landward parishes. The case of *Dunfermline* is in point. If the minister was entitled to a manse, in law, his accepting L.40 Scots of house-rent, would not have hurt his benefice. This decision can have no very general consequences ; it is fixed one way or other in almost every burgh, whether a minister should have a manse or not. There has been no manse at Elgin since the Revolution. In the decreet of modification and locality, the want of a manse was considered, and stipend provided accordingly. The acquiescence of the minister ever since, is a strong circumstance.

BARJARG. Where a charge is a burgh charge, no manse is due ; but not so where a burgh is in a large parish. Were the minister actually in possession of a manse, that might afford an exception from the general rule. The decreet of modification and locality was not sufficient to debar the minister, because that was upon the motion of the minister, not of the presbytery.

KAIMES. The Acts of Parliament, the decision 1750, and the modification

1769. *March 1.* EARL OF GLENCAIRN *against* The MAGISTRATES of KILMARNOCK.

IMPLIED ASSIGNATION.

A baron, feuing out his barony with baron-bailie powers, conveys no privilege to the vassal which is not specially granted in the feu-right.

[*Faculty Collection, IV. 167 ; Dictionary, 6313.*]

MONBODDO. There seems no difficulty either in the law or the fact. This burgh has nothing but what the superior gave : he did not give the power of naming clerks ; besides, he himself has constantly exercised that power. The nomination of clerk is not inherent in jurisdiction.

GARDENSTON. I think that the grant of a burgh of barony, and of its jurisdiction, implies a power to name clerks. This is the most natural construction that can be. A judge may be his own clerk if he pleases, and may write his own judgments. The only thing that can occasion difficulty is the practice ; but practice cannot take away an inherent right. I am glad to see this little republic asserting its privileges.

PITFOUR. This right of nomination *inest naturæ rei*. An exception may be introduced *rebus ipsis et factis* ; but nothing of this kind occurs here : there has been an acquiescence, and no more.

KAIMES. A judge may write his judgment himself, or name another to do it ; but the powers of the clerk are different. He is to certify the judgment by an extract, which the judge cannot do. When a man voluntarily gives away any right, I will not suppose more given away than expressed. I do not see any clerk ever named by the magistrates.

AUCHINLECK. The grant here was not voluntary or gratuitous, but for a valuable consideration : the town purchased its freedom from the superior. Clear that, when a jurisdiction is given by the Crown, a power to name a clerk is implied. If the superior here has the power of naming, he may refuse to name, and so render the jurisdiction elusory. I think little of the practice ; for the superior and the town were in good understanding together, and the town's agreeing to employ the baron-clerk was for private expediency.

PRESIDENT. A community may exist without this power : thus, in this very burgh, the superior, upon the matter, has the nomination of the magistrates. The commissions in process bear expressly to "be clerk to the town," and the town settles a salary upon the clerk so named. If the superior should neglect or refuse to name a clerk, the town would, from the necessity of the thing, have a power of naming.

JUSTICE-CLERK. When a jurisdiction is granted by the Crown, a power of naming officers for extricating that jurisdiction is also granted, from the nature of the thing ; but, here, a baron grants a jurisdiction over part of his territory, and says nothing as to the nomination of clerk. The question is, Whether is

1769. *March 10.* MARION RUSSEL *against* JAMES RUSSEL of Ashiesteel.

IMPLIED CONDITION.

Bond of Provision, containing heirs and assignees, falls by predecease of the Grantee.

[*Fac. Coll. IV. 177 ; Dictionary, 6372.*]

AUCHINLECK. There is no direct evidence of the death of David Russel ; but there are circumstances which show that he was reported and believed to have been lost soon after 1729, and he has never been heard of since that time. We must take the cause as it stands : Were the question with a child of David's, there might be a *conjectura pietatis* in favour of the child ; but, in the common case, bonds of provision granted to children, who die before the granter, are thenceforth considered as of no consequence ; and hence are often left uncanceled. The provision to heirs and assignees only relates to the heirs and assignees of the child.

PRESIDENT. It is admitted on both sides that David died. The plea of the pursuer and of the defender also is founded on this ; so that the presumption of law, in favour of life, is out of the question.

PITFOUR. If the father knew of the death of David, and did not destroy the bond destined to heirs and assignees, it may be presumed that he meant to let it go to heirs. He quoted a decision, *Galloway, November 1730.*

[This opinion was not relished, as being adverse to the sentiments and intention of every man in his settlements *intra familiam*.]

KAIMES. If David had left children, there might have been a difficulty ; but there is none in the case which exists.

On the 10th March 1769, "the Lords sustained the defences, and assoilied." *Act. R. M'Queen. Alt. A. Lockhart. Reporter, Pitfour.*

1769. *March 10.* JAMES BRUCE *against* ROBERT STEIN and OTHERS.

THIRLAGE—PRESCRIPTION.

Thirlage acquired by Prescription, upon a grant of the Mill and Pertinents.

[*Faculty Collection, IV. 178 ; Dictionary, 16,061.*]

AUCHINLECK. Here is a proper title ; but, in order to make a thirlage, it is necessary to say more than that there is a proper title and payment of

out-town multures. There must be a proof of such payment of multures as to show that the coming to the mill was *necessitatis*, not *voluntatis*: and so it was found in the case of *Bathgate*. It is necessary to establish that the multure paid was higher than what the malt could have been grinded for at another mill, with equal conveniency in point of distance.

HAILES. I doubt of the thirlage being established in this case, except as to those feuars who are expressly astricted by their charters: out-town and in-town multures are relative terms. It is admitted that every one who goes to this mill, pays the precise same multure. How then can any argument thence arise? or, how can there be any in-town multure more than out-town? I lay no great stress on the acts of court: they are not formal: the latest is in 1702. It does not appear that execution ever passed upon them: they are but four in number, and two of them relate to wheat, not malt. As to the steel mills, they are but a late invention at Alloa; and, consequently, the prohibiting the use of them, or exacting multure from the users of them, must also be a late practice. The first steel mill at Alloa appears to have belonged to the proprietor of the mill; and, when he allowed any one to use it, it was natural for him to require some consideration to be paid to his miller, who would otherwise have had reason to complain that his master withdrew customers from the mill.

KENNET. There is no mill so convenient for the people of the barony as this mill. It can have no custom from without; for all the neighbouring estates have mills of their own.

KATMES. If the mill is more ancient than the feus, (which is admitted to be the case,) this would afford a great circumstance of presumption in favour of the thirlage.

On the 10th March 1769, "the Lords found the defenders astricted."

5th July 1769, adhered.

15th February 1770, "found defenders liable in abstracted multure for three years preceding citation;" altering Lord Monboddo's interlocutor.

Act. R. M'Queen. *Alt.* A. Lockhart,

Rep. Monboddo.

Diss. Monboddo, Hailes, President.

1769. March 10. ARCHIBALD DUFF of Drummuir against JAMES DAY.

TACK.

Power of Subsetting implied in a Lease of Nineteen Years.

THE defender possessed a farm belonging to the pursuer, on a lease for nineteen years, in which no mention was made of a power of assigning or subsetting. The defender having subset a part of the lands, an action of removing was raised by the pursuer against him and his subtenant. In defence, it was stated that, as the lease did not debar subtenants, the power of subsetting was implied; and it was so found by Lord Strichen, Ordinary. In a petition, it was—

PLEADED by the Pursuer,—That the doctrine of the defender was opposed to

the authority of Stair, *lib. 2, tit. 9, sec. 22* and *26* ; M'Kenzie, *lib. 2, tit. 6, sec. 8* ; and Bankton, vol. 2, p. 97 ; and that the opinion of these writers was supported by the understanding and practice of the country.

ANSWERED,—When these authors wrote, tacks did not receive so liberal an interpretation as is now put upon them. Moreover, their opinions are not supported by any decision, while there is a series of decisions on the other side : *Earl of Morton* against *Tenants*, 14th July 1625,—*Howe* against *Craw*, 25th February 1687,—*Mather* against *Lord Tarras*, February 1687,—*Rothead* against *Mudie*, March 1687.

The following opinions were delivered :

MONBODDO. I am of the opinion of the two decisions mentioned by Harcarse. This is agreeable to the Roman law, where the *conductor* might use the subject as he pleased. I can account very well for the opinion of the lawyers who doubted as to the power of subsetting. This was from feudal principles, where not land, nor money, but men were considered ; and it was of moment what sort of persons were introduced into the estate of the lord : but these ideas are now obsolete.

HAILES. I doubt whether the lawyers of the last age meant that a lease for so long a term as nineteen years could not be subset, when subtenants were not excluded. Lord Stair considers a lease of nineteen years as approaching to a perpetuity ; and, although this is erroneous, yet it shows that a tenant with nineteen years' lease was considered as having a great interest in the subject let. When a lease is granted for such a term, there can be no great *delectus personæ*, because no man's life is worth so many years' purchase.

KAIMES. I never doubted, since I was a lawyer, that a tack for nineteen years allowed subsetting, if not prohibited.

On the 10th March 1769, "The Lords found that the defender, in virtue of his minute of tack, accepted by the pursuer, is entitled to possess the lands libelled ; and, as he is not thereby debarred from subsetting the same, therefore assoilied the defender ;" adhering to Lord Strichen's interlocutor.

Act. A. Lockhart. *All.* Cosmo Gordon.

1769. March 11. AYTON and COMPANY against HARRY CHEAP and OTHERS.

SOCIETY.

Copartnery, not bound by a commission executed after dissolution, by death of one of the partners, or given by one partner while ignorant of the death of the other.

[*Faculty Collection*, IV. 170 ; *Dictionary*, 14,573.]

HAILES. If the first part of the Ordinary's interlocutor is altered, it will fol-

Culross, and a special grant to Lord Kincardine. A grant of the sea-shore will convey wreck and ware. By the Roman law the shore was *res nullius*; but this is not modern law. We follow the constitution of the Emperor Frederic I. The only difficulty is from the prior grant. If Lord Kincardine had been in possession, and the town not, I would have preferred him: but the grant to the town may comprehend what is within the sea-mark, and the town has been in possession.

PITFOUR. The town of Culross needs no prescription: its right is preferable, and carries the sea-ware. As to the question of nuisance, that depends upon the distance.

JUSTICE-CLERK. The use of the sea-ware, by burning kelp, is new. What is a trifling addition to the revenue may do great damage to the inhabitants. I doubt whether the right and possession will authorise an inverting of the mode of possession. The house of Culross is within the royalty, and so the proprietor may here argue for his own behoof as an inhabitant.

On the 14th June 1769, "The Lords decerned and declared, with exception as to the shore opposite to Pretty Common and St Mungo."

Act. G. Haldane. Alt. J. Boswel. Reporter, Justice-Clerk.

N.B. As there was no proof of the nuisance, the question concerning it was not understood to be before the Court.

1769. June 15. JAMES SCRIMGEOUR *against* MESSRS ALEXANDER and SONS.

(*Faculty Collection, IV. 172; Dictionary, 3955.*)

EXERCITOR.—AFFREIGHTMENT.

Powers of a Ship-Master.

GARDENSTON. This is a mercantile case, and I would wish light from merchants of eminence unconnected with either party. The owners of the ship undertake a voyage, under an option between one port and another. The option was made, and the ship sailed without objection as to the late day; so that is out of the question. The purpose of the voyage was afterwards disappointed, without any blame on either party. In such an emergency, the discretionary powers devolve on the master, and his act binds the owners. It was judicious in him to make the new contract: in it he was assisted by the assurances of Mr John Alexander: events and accidents he could not foresee. The ship was first distressed by bad weather, and afterwards detained, in consequence of popular commotions in Carolina. Neither party is answerable for this, according to any liberal ideas of merchant law.

KAIMES. If the ship had been unexpectedly detained at the original place of

destination, the owners would have suffered the damages. I cannot think that the master of a ship may alter the voyage at pleasure. There is a good deal of equity here as to the master. The navigation of the new voyage was not more hazardous. The master might alter, upon taking proper precautions; and so he did, by obliging Mr John Alexander to warrant all damages. The question is, Whether the damages here incurred be within the obligation?—And I think that they are.

KENNET. Messrs Alexander were in fault by not having the sugars ready. This occasioned the deviation; and Mr John Alexander, Grenadas, became bound for the damages.

BARJARG. The letter from Mr John Alexander relates to all damages.

JUSTICE-CLERK. The principles of the petition are solid, if they will apply to the present case. After the option of the voyage was once made, the af-freighters had nothing to do but to perform the voyage, and, after waiting the stipulated time, to take a protest and return home. This would have entitled them to the freight covenanted. It was not discretionary to the master to undertake a voyage quite different. The master seems to have been sensible of the loss which might accrue to Messrs Alexander from paying freight for an empty ship; and, therefore, in order to accommodate them, he enters into another contract, but, at the same time, takes an obligation to indemnify, which will answer as to every loss.

AUCHINLECK. There was no obligation on the master to go to Carolina. Had he gone thither without an obligation to indemnify, he would have been liable for the accidental disasters arising on the voyage.

ELLIOCK. I think that the Messrs Alexander came in the place of insurers; and that insurers would not have been liable for the unforeseen detention at Carolina.

On the 2d March 1769, The Lords found Messrs Alexander liable for the damage arising from the ship being detained at Carolina.

Act. A. Lockhart. Alt. W. Craig. Reporter, Pitfour. Diss. Ellick, Gardenson.

1769. June 21. MRS MARGARET LAURIE of Redcastle *against* ALEXANDER SPALDING of Holm.

BONA FIDE CONSUMPTION.

From what period a *bona fide* possessor is accountable?

[*Faculty Collection, VI. 347; Dictionary, 1764.*]

MONBODDO. The case of this purchaser exceedingly favourable; for he in effect purchased upon an interlocutor of the Court. I must, however, find the

law to be as it has been laid down by this Court and by the House of Lords. The question is, When did the *bona fides* cease? This is settled, by the Roman law, from the time of *lis contestata*: and it is a rational rule; for every man is presumed to understand the law. And when a case is once fairly stated, the defender, if he fails in the end, is presumed to be sensible that his cause is bad. Our practice, it is true, goes not so far; but I think that *bona fides* must cease from the date of the interlocutor of the Ordinary. In the case of *Pitrichie*, *bona fides* was found interrupted by the first interlocutor of the Lords: but that does not impinge upon my principle; for that interlocutor, from the form of proceeding, happened to be the first interlocutor in the cause.

PITFOUR. I cannot adopt the maxim of civil law, that every man is presumed to know the law. We see the opinions of Ordinaries to be often doubtful, or corrected by the Court; and even the opinion of the Court to be corrected on a rehearing. Were the rule of the civil law to be adopted, a citation, or even a demand, would interrupt *bona fides*.

PRESIDENT. The question as to the ceasing of *bona fides* has ever been, and will be, arbitrary. So far seems clear, that, when a question occurs as to a point of law, the party is entitled to take the opinion of the whole Court. The question as to *bona fides* is in itself arbitrary;—it may cease from citation. In *Pitcaples'* case, it was found not to cease until the judgment of the House of Peers.

On the 21st June, “the Lords found the defender accountable from the first term after the first interlocutor of the whole Lords,” adhering to the interlocutor of Lord Justice-Clerk.

Act. G. Ferguson, R. M'Queen. *Alt.* A. Wight.

1769. June 27. THOMAS CARNEGIE of Craigo, and OTHERS, *against* JAMES SCOTT of Brotherton.

SALMON FISHING.

Construction of Cruives and Cruive Dyke.

[*Faculty Collection*, IV. p. 185; *Dictionary*, 14,299.]

BARJARG. If the channel is so rough with loose stones, as represented, it would be hard to require the cruives to be sunk lower down: we ought to take the medium as to loose stones. As to taking out the inscales, it is of no consequence: they may be put in from above, even in speats. So there is nothing impracticable in what the pursuers propose: but, if they are fairly fixed back, the consequence will be the same. Number of cruives is of great moment: it should be kept up as from time immemorial, for a solid dyke was never meant

devised for eluding the law, the Court may interpose and prevent the frauds ; but I do not think that the defender has so transgressed as that the interposition of the Court ought to be interposed. As to the causeways, it is hard to hinder the defender from securing the foundation of his dyke. No one can have right to the holes : the causewaying, however, must not be higher than the channel of the river. The uselessness of the cruives proceeds more from the circumstance of the law being enforced, than from the use of the causeways. As to inscales, the under nob is abandoned. I do not see what harm the upper one can do. To take the inscales out, on occasion of every Saturday's stop, is required by a former interlocutor of the Court ; but that regulation has been found difficult, if not impracticable. It may be supplied by an equivalent. As to the channel of the river,—the judgment 1746 is not a decision in the cause, because reversed of consent ; but still it is a precedent of this Court, and a good one. As to the number of the cruives,—had it been limited to one or two, there might have been a complaint, for you cannot make the whole dyke a blind dyke, except one ell. But I do not see any thing emulous here.

GARDENSTON. It is not yet clear whether unregulated cruives are hurtful or not to the general fishing. We act under the authority of a statute, and we cannot take cognizance of any thing beyond the statute, though we may explain and enforce it. As long as the defender was permitted to use irregular cruives in consequence of a paction, there was no wrong on his part. Now that the cruives are regulated, he may use the coble-fishing in the most advantageous manner. As to height and breadth, the law has made no regulations, and those things must vary according to the nature of the river. *Causeway*—in so far as it obstructs the fishing, in so far it is an evasion of the statute. For the same reason the cruives must be put in the channel of the river ; but I do not see why the owner of the cruives may not fortify his dyke. *Incales*,—of the opinion already delivered. *Number of cruives*,—I doubt as to our power, for the law is silent. Immemorial usage is out of the question ; for, in other particulars, that has been set aside. How can we destroy immemorial usage on the one side, and yet support it on the other.

ALEMORE. We are to consider how far the defender may be restricted. He may run the dam-dyke as he pleases. Natural impediments in the river will prevent an excess as to this. He must manage his cruives according to law, and as a man attentive to his own interest would do. The operations made by causewaying are in defraud of the law. The debate *inscales* is a debate about nothing. If they are set aside, it is the same thing as if they were taken away. I cannot suppose that the defender will not *bona fide* obey the injunctions of the Court. As to number of cruives—if they are honestly placed, there is no matter whether three or seven. In the one there will be the most tempting streams, in the other the most passages.

PRESIDENT. As to the dyke—there is no occasion to examine the point of law, for, in fact, no damage is done by it. The inscales may be regulated without being taken out. As to causeway,—a man having a right cannot use it emulously. If the causewaying is not an improvement of the cruive-fishing, he cannot support it upon his right to cruives. As to the number of cruives,—

if a man, *bona fide*, finds it for his interest to shut up some cruives, much might be said; but, if he does this *mala fide*, I would bring him back to the immemorial number which I will presume to have been in the original grant. The more opens there are in the dyke there will be less danger from floods; so that that argument is but a pretence.

KAIMES. The privilege of a cruive is beyond the common rights of mankind, and therefore must be exercised as it was given. He who has this privilege may give it up if he will; but, if he use it, he must use it according to his right. The defender then must show that the diminishing the number of the cruives is for the advantage of the cruive-fishing.

ELLIOCK. The defender cannot convert his cruive into a dyke or brae. If he thinks that his cruive-fishing is not worth his labour, he must throw down his cruive-dyke. I do not think that he uses the three cruives *bona fide*.

JUSTICE-CLERK. A cruive-dyke cannot be kept up without a cruive-fishing. If I could separate the evidence so as to see that the fishing was not diminished by taking away so many of the cruives, I would make a distinction; but this I cannot do, and therefore I am for removing every alteration which has been made to the detriment of the superior heritors.

KENNET. It is difficult to say whether three cruives or seven would be most for the benefit of the superior heritors.

(*Vide infra*, 16th November 1769.)

1769. June 28. GEORGE DUFF of Milntown *against* ALEXANDER BRODIE of Windiehills.

PART AND PERTINENT.

Kirk-seat carried by a Disposition of Lands.

[*Faculty Collection*, IV. p. 853; *Dictionary*, 9644.]

PRESIDENT. It was determined, in the case of *Kinghorn*, that the burgh has a right to a share of the church, and the heritors to another.

AUCHINLECK. Brodie had a right to a seat, as Laird of Milton, not as burgess of Elgin.

On the 28th June 1769, "the Lords found the pursuer entitled to the seat as part and pertinent of his lands."

Act. A. Duff. *Alt.* J. Douglas. *Rep.* Barjarg.

1769. June 28. ARCHIBALD EDMONSTONE of Duntreath *against* CAMPBELL EDMONSTONE, Esquire.

TAILYIE.

Found, by the House of Lords, that the prohibitory, and other clauses of an entail, being directed against *the heirs of entail*; the institute, being fiar or disponee, and not an heir of entail, ought not, by implication, to be affected by them.

[*Faculty Collection, IV. p. 386; Dictionary, 4409.*]

HAILES. I have no doubt of the tailyier's intention. The clause, "Archibald Edmonstone and the other heirs of entail," is a governing clause, and seems perfectly clear. It is in Latin, *hæredesque cæteri talliæ*, not *cæteri qui hæredes talliæ sunt*: "Other heirs" not "others' heirs." My difficulty is as to the decision in the case of *Randeston*, where the clauses were very similar to those in the present case, and yet the Court found the first member, call him heir or disponee, not bound.

GARDENSTON. The decisions quoted seem to be in point. The principle is, an entail must not be made by implication.

KAIMES. I am of opinion that an institute is not an heir; and, if the decisions say so, they say well. But still an entail must be explained according to the meaning of the entailer, and even from collateral circumstances. It is plain that here the entailer understood his eldest son to be an heir of entail.

AUCHINLECK. Whatever apprehensions judges may have as to the expediency or inexpediency of entails,—entails, while the law authorising them subsists, are to have a fair trial. All that I want to know is the meaning of parties. The case of *Findrassy* does not affect me, for it was an absurd deed. The case of *Randeston* does not apply; for there was a dubiety in that deed, and no phrase in it irreconcilable with the idea of James Balfour being a free man. Here the intention is plain from beginning to end.

KENNET. If a meaning may be gathered from words, it is hard to disappoint the disponent by criticisms. There is some difficulty arising from the decisions; but no two deeds can be so precisely similar that a judgment as to the one will apply to the other.

BARJARG. There is no doubt as to intention; but then a different rule has been established as to entails.

PITFOUR. The thing which weighs with me is this,—in the construction of fetters the Court liberally explains words in order to free from them. But, on the other hand, fetters are never put on by construction. It is the entailer's business to entail his estate, not ours. The cases of *Keith* and *Carlowrie* were determined contrary to plain intention. There are many cases which I have met with where a man only ties up the heirs of entail, and then speaks

of his son and other heirs of entail. This was supposed to tie up the son; but, upon inquiry, lawyers, at consultations, held the contrary. It is of no moment whether the clauses in other cases were the same, if the principle is the same. The procuratory is taken by the person who survives the entailer, whoever he be, and the obligations of the entail must be thrown into it; but still they will have the same effect there as in the entail, and no other.

KAIMES. The cases of *Keith* and *Carlowrie* are not similar: there a fetter was omitted from inattention; it was a *casus incogitatus* which had escaped the observation of the entailer. Here, words are clear, though not altogether formal. How can we get free of the words?

MONBODDO. Entails ought to have fair play. This testator meant to lay his son under fetters, and he has done it. Meaning, by itself, is not sufficient, as was found in the cases of *Keith* and *Carlowrie*: difference between what prohibition is laid upon heirs, and who are the heirs upon whom the prohibition is laid. The eldest son is bound by the leading clause. It is true he was not properly an heir; but every one succeeding to an estate by an entail, is said to be an heir of entail. Besides, Archibald Edmondstone was no more than a nominal fiar or heir. I was puzzled with the decisions, but I am much relieved by what I have heard from the Bench. In a *quæstio voluntatis*, as in a question of fact, one case is never exactly like another.

PRESIDENT. For the reasons given, I do not think the case of *Carlowrie* in point: besides, that decision was doubted. The cases of *Pittrichie* and *Balnagown* were more liberally determined. It is agreed that fetters cannot be imposed by implication; but, if the entail is once found to subsist, you must inquire what was the intention of the entailer. Was it Duntreath's intention to leave his son free? No. Do not the words imply fetters? The form of the provision to the younger children, and the obligation to infest, show that there are words to bind the son. The case of *Findrassy* went very far; and, besides, the Court was very much divided.

On the 28th June 1769, "The Lords sustained the defences, and assoilied."

Act. Ilay Campbell. Alt. A. Murray.

Reporter, Monboddo.

Diss. Pitfour, Gardenston, Elliock, Barjarg, Hailes.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

1769. November 23.—GARDENSTON. The tailyier had no power, being tied up by his marriage-contract. I also doubt of his intention to bind his son. In clauses beneficial to the son, he names him; in others he does not. Although the power were certain, and the will clear, yet, as there are no express words limiting, the power and the will go for nothing.

MONBODDO. The question of power is not before us, as is admitted on all sides. I am fond of the interlocutor, as proceeding on principles, without regard to the favour of creditors or odium of entails. I would wish that the

words, favourable and odious, were blotted out of our books of law. The question is not, whether fetters are imposed, but whether imposed upon the son. Some judgments seem to require technical words as necessary for imposing fetters; but, in the case of *Pitlurg*, that was found not necessary: however, that is not the question here. It is plain that the entailer meant to subject Archibald Edmondstone;—he was no more than a nominal fiar;—he was in effect an heir of entail. I would not conclude thus, were there only circumstances without words; for the rule of the Roman law is an admirable one, *nemo sine verbis dixisse videtur*. This probably was the foundation of the judgments in the cases of *Keith* and *Carlowrie*, where there might have been intention, but there were no words.

PITFOUR. I differ as to the rule of interpretation. In a question,—Who is heir?—we must take in intention, because we must give the estate to some one or other. In England, every thing is taken literally and strictly. Upon such occasions, with us, in imitation of the civil law, a greater latitude of interpretation is admitted. I do not inquire whether the English practice or ours is most laudable. The case, here, is of a different nature: we are desired to limit a man, which is a forfeiture in so far, and that upon intention. In not limiting, we do no harm; for every man knows, or may know, that he is to entail by words. I will judge upon entails made, but I will make an entail for no man. Upon the faith of the decisions in the cases of *Findrassy* and *Randieston*, lawyers may have given their opinions, and creditors may have contracted.

COALSTON. Limitations in entails are to be strictly interpreted: They are not to be extended from one case to another, nor *de persona in personam*. Question, here, whether there are words sufficient to include the eldest son? If there is no limitation upon him, I should be clear that he is not comprehended; but there are words explanatory in the entail, which show that the entailer meant to comprehend his eldest son. The difficulty is as to the decisions. It is a serious consideration if the lieges have proceeded upon the faith of former decisions.

AUCHINLECK. Every case is to be examined upon its own circumstances. If lawyers draw a wrong conclusion from any particular decision, who can help it? There are words, here, sufficient to comprehend Archibald Edmondstone.

JUSTICE-CLERK. My opinion may be erroneous, but it is honestly given; for every body knows that I am no favourer of entails. I cannot hesitate in pronouncing, that the entailer had an intention of comprehending Archibald Edmondstone, and that he, by words, expressed it.

BARJARG. I am now satisfied as to the interlocutor. It is a forfeiture of a man's right if you do not allow him to limit his estate when he uses words to that effect. If the entailer did not tie up his eldest son, then he made no entail at all; which is contrary both to his intention and his words.

KENNET. In five or six different places of the entail, he speaks of Archibald Edmondstone as an heir of entail.

HAILES. I have no doubt of the intention of the entailer. I am also of opinion, that he has expressed his intention in words sufficient to bind his eld-



est son : but, then, I make no doubt that *Randieston* had a like intention, and that he expressed his intention in words sufficient to bind James Balfour, his gratuitous disponent; and yet the Court found that James Balfour was not limited by the entail. Here lies my difficulty to reconcile the present decision with that of *Randieston*.

PRESIDENT. The case of *Randieston* is different : in it the institute was only mentioned as an heir of entail in the last clause, whereas the first clause in the entail of *Duntreath* mentions the institute as an heir of entail, and all the following clauses refer to it. There is some difficulty, from this circumstance, that Archibald Edmonstone is mentioned *nominatim* in so many of the clauses, and not in the rest.

On the 23d November 1769, "The Lords, in respect that it appears, from the entail, that the entailer mentioned Archibald Edmondstone as an heir of entail, found that he is subject to the limitations and restrictions of the entail, and therefore assoilyed from the reduction."

Act. Ilay Campbell, R. M'Queen. *Alt.* A. Murray.

Reporter, Monboddo.

Diss. Pitfour, Gardenston, Hailes.

Reversed on appeal.

1769. June 29. MR JOHN HASTIE *against* PATRICK CAMPBELL of Knap and OTHERS.

PUBLIC OFFICER.

Schoolmaster of a Royal Burgh removable summarily by the Council, upon just cause.

[*Faculty Collection*, p. 351 ; *Dictionary*, 13,132.]

BARJARG. This is a matter of administration, but not of jurisdiction, and is subject to review.

MONBODDO. Were the question, Whether Hastie was properly tried?—I should be clear that he was not : but the question is singly as to administration. The Magistrates have the power of turning out, both by public policy and by the decisions of the Court.

STONEFIELD. There is a contract, between the Magistrates and the schoolmaster, that he shall enjoy the office while he behaves properly.

PITFOUR. We now lay greater stress on freeholds than in former times. If a man is named a schoolmaster, his office is understood to be for life. The law has given to Presbyteries a jurisdiction over schoolmasters. I therefore think the proceedings before the Magistrates void, and am moved with the keenness showed by the Magistrates.

AUCHINLECK. The office of a schoolmaster is a small but an important of-

fice. The law, as to schoolmasters, is not well expressed : it says that they are amenable to the church courts ; but it does not say that the sole jurisdiction is in the church courts. The proceedings there are tedious and inextricable. There was no occasion to bring a formal libel. Upon a proper precognition and inquiry, a schoolmaster may be dismissed. The proceedings here were irregular. I would allow the proof to go on here, instead of throwing the cause into the church courts, which is the same thing as throwing it into the sea.

KAIMES. Whether a man is chosen into an office *durante beneplacito*, or for life, depends upon the nature of the office. The decisions have determined, rationally, that he who names a schoolmaster, may turn him out ; but then it must be at his peril.

PRESIDENT. I maintain the same opinion here as in the case of *Harvey* : he may be removed from his office, but not arbitrarily. It would be inconvenient and dangerous to bring a schoolmaster before a court of law, either civil or ecclesiastical, in the first instance.

On the 29th June 1769, "The Lords repelled the objections against proceeding ; but found it still competent for the pursuer to bring a proof, and the defenders a conjunct proof."

Act. A. Crosbie. Alt. Ilay Campbell.

Reporter, Pitfour.

1769. August 1. EARL of HYNDFORD, and OTHERS, *against* DAVID DICKSON of Kilbucko.

SEQUESTRATION.

Sequestration of Rents awarded upon the application of the Trustees of the proprietor of the estate, deceased, though opposed by the Heir, who had brought a reduction of the trust-deed.

[*Faculty Collection, V. 14 ; Dictionary, 14,847.*]

GARDENSTON. It is not competent for the trustees to obtain a sequestration when they may act if they think fit. Here they may act, but they find they have a troublesome party ; and, so, to relieve themselves from trouble, they would put the estate into the hands of the Court.

JUSTICE-CLERK. Dickson obstructs the management, and challenges the trust-right. There is a competition actually depending in Court. A sequestration is never refused, when asked by the person apparently in the right of the subject.

PITFOUR. Lord Gardenston's opinion does not apply ; for here there is a proper competition as to possession.

AUCHINLECK. If Dickson sought sequestration, and the others opposed it, there might be difficulty.

ELLIOCK. The trustees have the right; but the apparent heir is actually in possession.

STONEFIELD. In the *Douglas* cause, sequestration was not allowed. A sequestration is an odious thing; it is a license to mismanage an estate.

MONBODDO. It is nothing that the apparent heir has got into possession. The trustees must *age* to turn him out again.

On the 1st August, "The Lords sequestrated."

Act. J. M'Claurin. *Alt.* *Ipse.*

Diss. Gardenston, Strichen, Stonefield, Monboddo.

1769. August 1. DUKE of BUCCLEUGH *against* The OFFICERS of STATE.

PRESCRIPTION.

Prescription of an erroneous Tenure of Lands.

[*Faculty Collection*, IV. p. 321; *Dict.* 10,711.]

HAILES. The charter 1664, was, in all probability, erroneous: a favour, however, was meant and done to the family of Buccleugh, and the family enjoyed the benefit for near a century, and would have done so still, had it not been for a change in the law. The clause, *aliis jus habentibus*, could not have been inserted from any doubt of the Crown's right; for, if Sir John Ker's right had been in the eye of parties, it was plain that the Crown had no right; and, if it was not in the eye of parties, then the Crown's right could not have been doubted. The clause may mean, to the chamberlains of the Crown. It is not improbable that there was some intention of granting the feu-duty to a trustee for the benefit of the family of Buccleugh, and then he would have been the *alius jus habens*. The family had so little idea that the clause meant any one unconnected with the King, that the late Earl of Dalkeith omitted it out of his charter. The pursuer cannot found upon a clause which is left out of the titles of his family.

MONBODDO. If the charter had been granted simply with a *reddendo* to the King and his successors, the Duke of Buccleugh would have been liable in the feu-duty; but the addition of the words, *aliis jus habentibus*, makes a difference, and lays the length of time out of the question. It is the same thing now as if the Duke had said, recently after 1664, that the King had no right, and that Sir John Ker had. And the plea is still competent.

JUSTICE-CLERK. If the *reddendo* had been still the same, and the clause of a feu-duty erroneously thrown in, there might be more difficulty; but here

there was a change of the holding introduced, and what was a favourable composition at the time. In another view of the case, the Crown changes ward into feu, without any consideration. The King might have done so, and I make no doubt that he would have done so had that favour been asked ; but I do not see that the favour was ever asked or granted. There was a cause onerous for asking a feu-duty ; at the same time, the non-payment of feu-duty, for so long a period, is an argument to be urged on the part of the pursuer.

KENNET. The charter 1664 was originally a blunder. It has been found that the pursuer cannot be benefited by it, so as to hold ward, and of consequence blench. The same argument would have been good against the Crown had there been no change introduced by the statute George II. According to the same principle, we must hold the feu-duty to be payable to the Crown. Negligence of the King's officers cannot hurt the Crown. This may answer the argument from non-payment of the feu-duties.

PITFOUR. The finding the Duke liable is a consequence of the former decision.

AUCHINLECK. It is clear that, at the date of the charter 1664, the lands did not hold of the Crown, and that the charter was erroneous. The clause *aliisve jus habentibus* is a confession, on the part of the Crown, that the right of the Crown was dubious, and like a charter *supplendo vicem* of Sir John Ker. Had any question been moved at the time, the blunder would have been corrected ; but the difficulty is, that the lands have been held of the Crown so long. The only way would have been for the Duke to execute the procuratory from Sir John Ker : but even this has been cut off, by his leaving out altogether the clause *aliisve jus habentibus*.

On the 1st August 1769, " The Lords sustained the defences, and assoilied."

Act. A. Lockhart. Alt. H. Dundas.

Diss. Monboddo.

Non liquet, Strichen.

[A petition was presented against this interlocutor ; on advising which, with answers, the following opinions were delivered :]—

1769. November 17.—PITFOUR. Prescription does not take place in this question ; for there has been no possession. It is not length of time, but the acquiescence of parties which creates prescription.

COALSTON. The charter 1664 was made up erroneously, yet I think the former interlocutor right, which determined the right of superiority to be in the Crown. Had a feu-duty been paid, or had the feu-duty been taken simply payable to the Crown, the Crown would have had right also to the feu-duty ; but here no feu-duty has been paid, and the clause is *aliisve jus habentibus*.

KAIMES. I think the *novodamus* is binding on both parties without the aid of prescription. Suppose that this question had occurred before the abolishing of ward-holding, could the King have claimed the lands as holding ward ? No. If so, Ought not the claims of parties to be reciprocal ? Shall we give the Duke

a right which he would not have had, and certainly would not have asked before the abolition of ward-holding.

JUSTICE-CLERK. In a feu-holding there must be a feu-duty payable to the superior, or to some one in his right. A great benefit has been enjoyed by the family of Buccleugh by the change of holding. The equivalent must be rendered effectual to the crown: this cannot be without payment of a feu-duty. I never can interpret *aliis jus habentibus* to be the vassal, or any one in his right. It rather means others having right from the Crown.

PITFOUR. A feu-duty is not absolutely necessary; for a feu-duty may be separated from the superiority. Thus, in the case of church-lands, the feu-right is in the Crown: but the feu-duty is in the Lords of Erection, redeemable before the statute 1707, irredeemable since. The feu-duty is not the only emolument of superiority: there are other casualties which are sufficient to maintain the existence of the holding.

KENNET. The superior may discharge the feu-duty; but, in this case, the Crown has not discharged it.

AUCHINLECK. This is an extraordinary and anomalous case, owing to blunders in the transmission of the Buccleugh estate. There could be no question were it not for the words *aliis jus habentibus*: Does not this import a confession that there was something defective in the right of the Crown?

GARDENSTON. The Crown seems to have acquired right to superiority, but not to feu-duty. *Tantum prescriptum, quantum possessum*. The vassal has held of the Crown; so far good: He must still hold of the Crown; but the Crown has been in possession of no more.

KAIMES. This is contrary to the established rules of law. A superior is secure by the granting of a charter; and, though he should never have exacted any feu-duties, he may exact them for forty years *retro*.

MONBODDO. The clause, *aliis jus habentibus*, cannot mean a person in the Crown's right: this is not style. *Aliis* means others than the Crown.

[Yet it appeared that, in the property lands of the Crown, *aliis jus habentibus* was used for the Crown's factors and receivers.]

On the 17th November 1769, the Lords altered the interlocutor of , and "found the Duke not liable in the feu-duty, in respect that the lands held originally of Sir John Ker for the same feu-duty as is now claimed; that the clause, *aliis jus habentibus*, implied some person not in the Crown's right; and that the Crown had never been in possession by levying the feu-duties."

Act. J. Dalrymple. Alt. H. Dundas, &c.

Reporter, Auchinleck.

Diss. Justice-Clerk, Kaimes, Kennet, Stonefield, Hailes.

N.B.—This last judgment, altering the original interlocutor, is not noticed in the report in the Faculty Collection.

1769. November 15. [MARGARET PARK *against* WILLIAM GIB.]

TERCE.

Terce due from Tenements in Burghs of Barony.

[*Faculty Collection*, IV. 354; *Dictionary*, 15,855.]

AUCHINLECK. The question is, Whether terce due out of a tenement in the burgh of Paisley? Paisley is not a royal burgh: the lands there pay cess with the county, and the tenements there are rural tenements; so that the rule laid down by our lawyers, as to terce not being due in royal burghs, does not apply.

KAIMES. My difficulty is, that the subject in question is a house not fit for division, and not capable of a terce, nor liable in it.

MONBODDO. I consider this burgh as a burgh of barony holding of a religious house. The burgesses of a burgh of barony hold their lands of the Crown, as much as the burgesses of a burgh-royal, in burgage.

HAILES. I never heard till now that the burgesses of a burgh of barony hold their tenements of the Crown by burgage-holding: they hold feu of their superior. They are not liable to watching and warding by their tenure; though, for their own private conveniency, they may watch within their burgh. Even in the grant by Charles II., on which the defender principally founds, there is not any vestige of a burgage-holding.

COALSTON. Burghs of barony do not hold burgage: they hold feu of the superior. There is a great distinction between a burgh-royal and a burgh of barony. Summary arrestment is authorised by the statute in the one, but not in the other.

JUSTICE-CLERK. Of the same opinion. Heirship moveable extends to burgesses of a burgh-royal, who are therein put upon the footing of barons; but this right was never extended to burghs of barony. There is an obscurity in the law, which excludes terce of burgage tenements; but so the law has been understood. Here we ought to draw the line: it would be dangerous to go farther. There are many burghs of barony more considerable than royal burghs: By including them, we might make a convulsion of settlements of which we are not aware.

PITFOUR. The question is, Does this subject hold burgage? Burgesses in burghs of barony are burgesses within the burgh; because the Baron has a power of naming magistrates who may name burgesses; or he has a power of naming burgesses. But, as to the rest of the kingdom, and as to the operation of the law, they are not burgesses. There are many burghs of barony dormant;—that is, barons have a power of erecting such whenever they think fit: it would be dangerous to extend the law which relates to burgage tenements. As to the supposed difficulty in dividing a house, in order to ascertain the terce, the same difficulty occurs as to mills, which yet are divided.

PRESIDENT. The privilege must not be extended. If there is in practice any anomalous right, a holding without a reddendo, which may be the case here, I would not extend the privilege to such anomalous right.

On the 15th November 1769, "the Lords found the claim of terce relevant;" and adhered to Lord Gardenston's interlocutor.

Act. R. Sinclair. *Alt.* Ilay Campbell.

1769. November 16. WILLIAM LORD HALKERTON, and OTHERS, *against* JAMES SCOT of Brotherton.

SALMON FISHING.

Construction of Cruive and Cruive-dyke.

[*Faculty Collection*, IV. 185; *Dict.* 14,293.]

MONBODDO. I am clear as to adhering as to the placing of the cruives. (All the judges agreed in this.) As to the causeway, it must not remain as at present; but there is a method proposed which may tend to secure the dyke, without hurting the superior fishings; and to this I would listen. We may admit an equivalent for what is not ordered expressly by law, but is only ordered by the interlocutor of the Court. As to the number of cruives, the original grant refers to use and wont; and, therefore, the number of seven must continue according to use and wont. We cannot fix any other rule than that. If Brotherton may insist to keep but three cruives, he may, upon the same principle, insist to keep but one; which would be rendering his cruive-fishing elusory, in order to benefit his coble-fishing.

HAILES. I have a suspicion of the equivalent proposed. I doubt whether it is consistent with the pretended cause of it—the security of the dyke. If there are to be so many grooves or channels, the causeway will be much impaired. I doubt whether the plan is practicable. The question as to the number of cruives is difficult; but I think that we can find no rule but possession. Brotherton and his authors, while they seriously occupied the cruive-fishing, did immemorially use seven cruives. We must therefore presume that seven cruives are necessary for occupying the cruive-fishing in the most beneficial way that he is entitled to exercise it in. If Brotherton uses fewer cruives, it is with the view of benefiting his coble-fishing at the expense of his cruive-fishing, and to the hurt of the superior heritors.

PITFOUR. The ancient immemorial usage must be the rule, unless in things unlawful or indifferent.

GARDENSTON. As to the number of cruives, immemorial possession is nothing; because immemorial possession has been disregarded in the other parts of this cause.

AUCHINLECK. The difficulty in this cause is, that he who has the cruives does not incline to use them. If Brotherton could convince me that seven cruives were of no use to the cruive-fishing, he would have a great deal to say. Brotherton would not surely agree to let the superior heritors fish those super-numerary cruives, which he asserts to be useless. We ought to keep to use and wont while the cruive-fishing was *bona fide* used. As to the proposal of rectifying the causeway, the expediency of that will depend upon the fact, whether the foundation be channel or gravel?

COALSTON. Cruives must be regulated by immemorial possession. Nothing more prejudicial can be done to the neighbouring heritors than what was done formerly. When Brotherton had seven cruives, he also filled them up in the winter: it is hard to oblige him to keep them up and yet not allow him to fill them in the winter.

JUSTICE-CLERK. The court will not be deaf to any argument which may be for Brotherton's advantage, without hurting the justice of the cause. I would therefore allow the alternative proposed. The superior heritors do not show that three cruives will not serve their purpose, as well as seven; and, therefore, I incline to allow three to be used.

KAIMES. The proposal of correcting the causeway is *res innoxie utilitatis*. It is said, that Brotherton has right to seven cruives; therefore he must keep up seven. This is no just conclusion. The conclusion ought to be that he may continue them. Besides, they were kept up by a sort of connivance with the superior heritors. As to the superior heritors showing that three cruives will be of less benefit to them than seven, that depends on the nature of the river.

PRESIDENT. Difficulty as to the cruives. For how can we oblige a man to keep up as many cruives as he is entitled to? What law can force a man to exercise a right in a manner most beneficial to himself if he does not incline it? I doubt whether seven cruives would be more beneficial than three to the superior heritors. The expression, in the right, *as anciently used*, relates to the mode of fishing, not to the number of cruives. If, by the law, Brotherton could *bona fide* have used but three cruives, why should he be obliged to use more when he comes to have a right to another sort of fishing? What should prevent him from using cruive-fishing in subserviency to his coble-fishing? My argument, I admit, will lead to this,—that Brotherton might use one cruive instead of three. I see this consequence, and I see the inconveniency which might thence arise.

PITFOUR. In the case of coble-fishings, a man may use what nets he pleases; for a grant of that sort of fishing is a grant to catch as many fish as can be caught: but a grant of cruives is an unnatural right, and must be used with moderation. If Brotherton may use so few as three cruives, he may use but one. This would be a cruive *dicis causa*.

ELLIOCK. Brotherton's whole management has been for the purpose of destroying the cruive-fishing. In regulating cruive-fishings we must consider not only the interest of the superior heritor, but also the preservation of the species.

On the 16th November 1769, "The Lords found that the causeway, as at present used, is improper; but remitted to the Ordinary, who pronounced the Act, to receive proposals for rectifying the causeway; and adhered *quoad ultra*.

Act. H. Dundas. *Alt.* A. Wight. *Diss.* as to number of cruives,—Gardenston, Kennet, Justice-Clerk, Coalston, Barjarg, President ; [who could not vote, as numbers unequal.]

Non liquet, Kaimes.

1769. November 17. ROBERT FULTON *against* ROBERT POLLOCK.

ACT OF GRACE.

A Debtor, liberated upon the Act of Grace, may be again incarcerated at the instance of the same creditor, a process of *cessio bonorum* being the proper remedy.

[*Fac. Col. V.* p. 6 ; *Dictionary*, 11,815.]

PITFOUR. By constant practice, whenever a debtor is liberated on the Act of Grace, he disposes his effects to his creditors ; so that the creditor comes to have a right in them. If a man is once liberated upon disposing every thing, shall the creditor have a power next day to take him up again ? No decisions are necessary to prove this, nor any decision capable of proving the contrary. The decision, *Law*, 1709, is in point, for support of this opinion. The decision, *Abercrombie*, points the other way ; but that was a singular case : the debtor was a contentious, profligate person, who would rather be alimented in prison than earn three shillings a-day by his work. He had the audacity to bring a process of wrongous imprisonment against the creditor who re-committed him. The court assoilyied from the wrongous imprisonment. The interlocutor mentions also the finding the letters orderly proceeded : but the debate was as to wrongous imprisonment. [This decision seems not well accounted for.] But, at any rate, this single decision will not alter the law. Can Fulton say that Pollock is possessed of more effects at this moment than he was when set at liberty ? If he cannot, what pretence has he for renewing his diligence ?

AUCHINLECK. According to Fulton's doctrine, if a man is let out to-day, he may be taken up next day ; let out the third ; and so on, *ad infinitum*. This would be oppressive, and could serve no lawful purpose.

KENNET. The Act of Parliament was made for the relief of the magistrates of royal burghs. The judgment of the court, in the case of *Abercrombie*, was my rule.

KAIMES. A man's coming out on the Act of Grace, is for the relief of magistrates in royal burghs. There is nothing to hinder the creditor from committing him the next day. As long as a debtor got out without executing a disposition, there was some reason for allowing such second commitment ; but now, as a disposition is always required, the creditor ought not to commit again unless he can show new funds.

GARDENSTON. The fraud of debtors is at present a more universal evil than the cruelty of creditors. When a creditor is willing to aliment, the Act of

Grace is out of the question. If the debtor is not satisfied to remain in prison, he may bring a *cessio bonorum*. We must not confound the two reliefs,—that of the Act of Grace and that of the *cessio bonorum*.

COALSTON. Feelings of humanity draw one way; the rigour of the law possibly draws the other way. There are two decisions quoted: the earliest, the most merciful. I would follow it. But here a concealment is alleged, which implies fraud, and would remove every plea of favour.

AUCHINLECK. This is a distressing case. If Fulton has let Pollock out from oversight, he may be allowed to recommit him; but I would not allow recommitment, unless upon an obligation to aliment, until the debtor brought a *cessio*.

KAIMES. If a creditor shows any malevolence in repeating the commitment, the Court may interpose, and require an oath *de calumnia*.

JUSTICE-CLERK. There is no law so favourable to misfortunate debtors as the law of Scotland; no Court which gives a more summary and less expensive relief of *cessio bonorum* than the Courts of Scotland. That is the proper process for doing justice both to Pollock and his creditors. If a disposition, in order to obtain an Act of Grace, is to be equivalent to a *cessio bonorum*, the consequences will be fatal.

COALSTON. The granting the prayer of the petition will not discharge the diligence of other creditors, nor even the diligence of this creditor; for, *causa cognita*, he may still insist for committing his debtor.

On the 17th November 1769, “the Lords found the letters orderly proceeded, reserving to Pollock to liberate himself in an action of *cessio bonorum*,” adhering to Lord Kennet’s interlocutor.

N.B. A reclaiming petition was ordered to be answered; and the cause was privately adjusted.

Act. W. Wallace. *Alt.* J. Dalrymple.

Diss. Coalston, Pitfour. [Auchinleck did not vote, being in the chair.]

1769. November 22. ROBERT STEWART against JAMES MITCHELL.

HUSBAND AND WIFE.

Donation, though a consideration given, which in some measure gave it the appearance of a transaction, yet, being very much to the wife’s prejudice, held to be revocable.

[*Faculty Collection*, V. p. 8; *Dictionary*, 6100.]

BARJARG. From the whole circumstances of the case, this seems a transaction rather than a donation, and I do not see such an inequality in the transaction as is sufficient to set it aside.

HAILES. I consider this as a donation. The wife gave up her probable expectation of £1500 for £250. Even as a transaction there is an excess, and the mutual contract, *stante matrimonio*, will not bind. The difficulty is as to the ratification and implement, by payment of £30 to her niece; that sum was

given upon the supposition that the deed was to subsist. An implied ratification, *stante matrimonio*, is not sufficient to validate this deed.' It is said that the defender, in consequence of the mutual deed, intromitted with the household furniture. The answer is,—That immediately, or a few weeks after the husband's death, she revoked her part of the deed.

AUCHINLECK. The law has provided against donations between husband and wife, but has not precluded proper and onerous bargains. By means of the marriage-contract the wife might have got much or little: that depended upon the nature of the husband's subjects at the time of his death. A change of the nature of the subjects might not be good, if fraudulently altered; but why should the wife take advantage of the situation of the husband's estate, which may have been suffered to remain in the same condition in consequence of this transaction?

MONBODDO. If this business were no more than a donation, although in the shape of a transaction, it might be set aside. But I do not see that the wife gave up a certainty, nor that there was any inequality in the bargain, such as to make it a donation. The husband does not seem to have meant any injury to his wife. The wife, on her part, meant to secure something certain for her nieces. The payment of the L.30 was execution *pro tanto*.

PITFOUR. By the marriage-contract the wife had the half of the liferent of the heritage indefeasible, and the half of the property of the moveables defeasible; for the husband might have altered their nature by making a purchase of land in the course of ordinary administration. His power of vesting his moveables in bonds, whereby the marriage-contract would have carried nothing, seems to be a more limited power. However, he neither did this, nor is there any reason for believing that he would ever have done it. In such circumstances, a deed is executed by the wife, declared by the parties to be a donation, for it bears love and favour. It is obviously prejudicial to the wife.

JUSTICE-CLERK. This is a cause of consequence, as respecting that great privilege of our law which sets aside all donations between husband and wife. If we refuse to find this donation revocable, we, in a great measure, destroy that privilege. The husband's estate amounted to about L.3000. The widow's share must have been greater than the provision in the settlement. I am not to presume that the husband would have altered the situation of his estate: he was a trader, and in all probability would have so continued. In such circumstances a deed was executed by the wife to gratify the husband, but with great prejudice to the wife. This is purely a donation *quoad excessum*. If the husband had any intention of altering the nature of his estate, and has not done it, the law will not regret it.

COALSTON. The question is, Whether was this a rational transaction or not? This will appear from what the wife gave up, and from what she got. She had right to the liferent of half of the heritable subjects, and to the fee of half of the goods in communion. We ought to know the extent of the goods in communion. What the wife gave up was a claim both eventual and uncertain, as depending upon her surviving her husband, and upon the situation of his estate

at the dissolution of the marriage. The claim therefore might be more or less, or might be nothing at all.

KENNET. I think this was a donation; and that the marriage-contract was one-half of all moveable subjects to the wife. She renounces the liferent of the conquest as well as the right to moveables,—this was giving up too much.

GARDENSTON. I cannot regret that a widow should get what her marriage-contract gave her. The law has provided that a donation between man and wife may be revoked, and even a transaction, if unequal and prejudicial.

PRESIDENT. I go upon the supposition that the effects were very considerable at the time of the transaction. This was plainly a donation: I do not suspect the husband of fraud in obtaining it; but the law is calculated to prevent donations from affection, where no fraud intervenes. I will not suppose that the husband had any intention of changing the nature of the subjects, in order to disappoint his wife's claim. He was a trading man, and most of his property was vested in goods: it continued so vested until his death, and would probably have continued so, although the deed in question had not intervened.

On the 22d November 1769, "the Lords found the deed revocable."

Act. A. Lockhart. Al. R. M'Queen. Reporter, Stonefield.

Diss. Kaimes, Coalston, Auchinleck, Barjarg, Ellick, Monboddo.

1769. November 24. BESSIE ROWAND, and OTHERS, *against* JAMES COCHRAN.

SALE.

Lands being exposed to Sale, and the articles bearing that the purchaser was to accept such progress as could be delivered, and to be debarred from objecting on that account, found to be an effectual sale, though the progress was defective.

[*Faculty Collection, V. p. 10; Dictionary, 14,178.*]

MONBODDO. A man buying by a lame progress, is like a man buying a lame horse, knowing him to be lame: he has no relief. There was no fraud here; but, on the contrary, the faulty part of the progress was produced, which the seller might have secreted.

JUSTICE-CLERK. The words of the articles of roup are irresistible. The sale would have been good, although the progress had been worse. The purchaser may have been ignorant or careless; but that makes no difference.

GARDENSTON. It would destroy the credit of all public rousps were we to set aside this sale.

On the 24th November, "the Lords remitted to the Ordinary." [It was understood that he should find the price due, upon turning the decret into a

libel; but this could not be done directly, because the charge was for the penalty, not for performance, although the parties had joined issue upon the merits of the sale.]

Act. Ilay Campbell. *Alt.* R. Cullen. *Rep.* Auchinleck.

1769. December 1. JOHN and WILLIAM WILSON against GEORGE WILSON.

CLAUSE—PROVISION TO HEIRS AND CHILDREN.

Meaning of the term “Heirs and Bairns,” or “Children,” in a contract of marriage.

[*Fac. Coll.*, V. 12; *Dictionary*, 12,845.]

MONBODDO. Setting the case of *Kemp* aside, of which I know not the circumstances, I doubt as to the interlocutor. The expression is, “heirs and bairns.” When a testator departs from ordinary words of style, I must suppose that he meant something more than heirs. This is confirmed by the clause of division, where he speaks of children, referring to the former clauses.

PRESIDENT. The expression, *heirs and bairns*, may mean as in the interlocutor, when there are no interpreting words: such was the case of *Kemp*. But there may be interpreting words. The clause, as to the provision of 4000 merks, affords evidence that, by heirs and bairns, the testator meant children: for the provision in that clause might chance to be heritage as well as moveables. If it was heritage, then, according to the principles of the interlocutor, the eldest son gets every thing, and the younger children are disinherited altogether.

PITFOUR. What is now stated is new. I supposed that the provisions in the second clause were simply as to moveables. My rule of interpreting was this: *Non tantum Atreidæ uxores suas amant*. Small heritors are as fond of their paternal estates as great ones. A provision of an estate to heirs and bairns, is therefore limited to the eldest son. When a clause of conquest is to heirs and bairns of the marriage, it is to be interpreted *applicando singula singulis*, heritable to heirs, moveable to younger children; the intention is to provide *stirpi*, not for any particular child. It is not new, in the interpreting a deed, to make the same word bear different meanings. This happened in the case as to the succession of the *Earl of Selkirk*, where heirs and assignees whatsoever was found to imply both the heir of line and the heir of conquest. In the appeal, the judgment of the Court of Session was burlesqued, and it was said “that the law of Scotland must be a very strange law, which in the same deed interpreted the same words different ways.”

PRESIDENT. I admit that the law is rightly laid down by Lord Pitfour; but still the difficulty recurs, May not a man affix his own meaning on words; and is that not the case here?

KAIMES. In the interpretation of a testament, the English lawyers produced fifty authorities to support the words against the probable sense. Lord Mansfield said, "All this is well; but will you show me that the testator ever heard of one of those fifty authorities?" I can never imagine that a plain country farmer used the same word in two senses so opposite, as by the one to exclude, and by the other to include younger children.

JUSTICE-CLERK. In forming my opinion, I do it upon this principle, that here is entirely a *quæstio voluntatis*. Taking all the clauses together, I think that heirs and bairns uniformly mean children. In the case *Rankin against Rankin*, 1786, the conquest was provided to heirs and bairns. The conquest came to consist of heritage as well as moveables: it was found to divide *per capita*. That decision is the more apposite, because it was pronounced among people of the same rank with the Johnstones. To all this I add the last clause concerning dividing the provisions to said children. There is nothing limiting the word provision to the subjects different from the little land estate; and the word children comprehends both the heir and the younger children.

PITFOUR. I think that the lands were provided to the heir of the marriage in the same way as they had descended to the disponent from his predecessors. I also think that the 4000 merks were provided to the children of the marriage. The chief rule of construction is from the meaning of the testator. We ought to lay more stress upon what he saw and knew, than upon what he did not know and was a future contingent event. He knew that the land estate had come from his ancestors; he did not know what his issue would be, nor what his conquest would be. Let me suppose that the word *bairns* had been omitted, and that the provision both of the heritage and the moveable estate had been to the heirs of the marriage, the former would certainly have gone to the heir, the latter to the younger children. Dirleton thinks that, in a merchant's succession, houses and heritable bonds will divide among children when provided to heirs and bairns;—and rightly, for that those subjects are divisible, whereas it is difficult to divide an estate, as was seen in the case of *Carnock*. When a land estate is provided to heirs and bairns of the marriage, the provision means, to such of the bairns as shall be heirs *suo ordine*. This is laid down by Lord Bankton; and so also determined in the case of *Kemp*;—so understood in the case of *Strang against Strang*, 17th July 1751. The old decisions do not affect this case. 1st, They relate to moveable subjects and tenements; 2d, They relate to clauses where there was mention of bairns without heirs. Lord Mansfield's opinion is well founded, (as quoted by Lord Kaimes,) and confirms the opinion which I give. Wilson must not be supposed to have thought of legal niceties of interpretation; but he knew that he got his estate from his father, and it was natural for him to transmit it to his heir. This was natural, and this he must be presumed to have done. I do not think that the case of *Rankine* applies. There, there was no provision of a proper land estate. As to the clause of division among children, it does not relate to the settlement of the land estate. The settlement was direct. The provision was only what gave a ground of action; so that the dividing clause does not relate to the land estate.

PRESIDENT. None of the decisions urged by Lord Pitfour are applicable to this case; because in none of them were there any collateral circumstances ex-

MONBODDO. The quotations from the civil law are properly applied. The law is not so invidious as to prevent the husband from becoming richer when the wife does not become poorer : here the wife did not become poorer, for she had no antecedent right to the subject.

COALSTON. The law strikes at all donations between man and wife, whether direct or indirect. I admit that the wife was not a creditor in a clear obligation ; but she was understood to be creditor in a natural obligation. The other children considered themselves as bound to fulfil the intentions of the father. It is no matter whether the claim be good or not. If the wife discharges a doubtful claim, and that is conveyed to the husband, it will be held a donation, and the Court will not examine into the merits of the claim.

GARDENSTON. If the father had made the addition to the daughter's provision, then the husband would have had it. The children have done what the father might have done, and granted the money to the husband. How can we invert this, and grant it to the wife ?

JUSTICE-CLERK. From considering the contract of the 20th March 1758, I doubt as to the interlocutor. It is the same thing as if the children had previously agreed to make up the sum to Mrs Watson, and that she had agreed that it should be transferred to her husband. The quotations from the civil law do not apply ; for there the act of donation proceeded from the testator, and therefore *nihil defuit* to the wife. My opinion does not go to the bill for L.85 granted by the mother ; for she was under no natural obligation, and was not a party to the transaction, 20th March 1758.

KAIMES. There seems nothing in law or in equity against the interlocutor. I should admit that a claim which the wife had, if conveyed to the husband, might be held a donation ; but that is not the case here. There was no natural obligation in favour of Mrs Watson : she had *ab ante* discharged her. Thomas Foggo thought there was no natural obligation, for he would not accede to it : the youngest sister thought there was no natural obligation, for she revoked her consent. This was no more than a present made. We cannot alter the nature and terms of the present, and give to Mrs Watson what her own family voluntarily gave to Mr Watson.

BARJARG. It does not appear that the husband's heir is taking any thing by the deed of the wife : the discharge was unnecessary on the part of Mrs Watson, for there was no previous obligation to be the subject of a discharge.

PRESIDENT. The case seems plain, and there is no hardship in it. It was understood by the parties, that the addition should go in the same way with the original tocher ; and as they understood, so they executed.

On the 1st December, 1769, the Lords found, " That, as the pursuer and her husband, in their contract of marriage, accepted of the tocher therein contracted for by the pursuer's father, in full of all that they could ask of him, the father, the grant made by some of the pursuer's sisters and brothers, and by Mrs Foggo, though devised in form of a contract between them and the pursuer and her husband,—in fact was no other than a donation upon the part of the mother and younger children : and as they made it directly in favour of Mr Watson, the husband, so that he owed it entirely to their generosity and the regard, it would appear, they had for him ; and did not owe it to the pursuer,

AUCHINLECK. John Dickson had a title of property, either personal or feudal, to the whole subjects disposed: the disponees are preferable to the heir. As to what is said, that the trustees have no occasion for sequestration, in that I would allow the parties to judge for themselves. If, from appointing a factor, any unnecessary expense should arise, the objection against it will be entire when the trustees come to institute a count and reckoning.

KENNET. In modern practice a disponee is preferred to the apparent heir. David Dickson cannot object that the trustees are willing to quit possession: this is rather advantageous to him than hurtful, for it will leave the rents *in medio*, to which he claims right. As to sequestrating the moveable estate, it appears that the trustees expedite a partial confirmation: this gives right to the whole. David Dickson's confirmation is not good, not being *ad omissa*, and being expedite *pendente processu*.

PRESIDENT. The case of *Douglas*, mentioned by both parties, is not in point. Mr Douglas was both heir-of-line and had a death-bed disposition in his favour. His titles would have been completed in a day or two: besides, there seemed to be a plan of putting him out of possession, and thereby of disabling him from maintaining his right. Here the trustees are *ex facie* in the right, and desire to have the estates sequestrated: here is a question litigious and proper for sequestration. The difficulty is, that the apparent heir says, Do not load me with the expense of a factor: if Mr Dickson is not himself a proper person to be factor, he may suggest some proper person. As to moveables; of Lord Kennet's opinion, and for the same reason.

COALSTON. My own opinion in the case of *Douglas* proceeded on this, That Mr Douglas was disponee by the death-bed deed.

On the 5th December 1769, the Lords "adhered to their interlocutor of the 1st August 1769, sequestrating the estate heritable and moveable; but remitted to Lord Elliock to hear parties further as to the nomination of a factor."

Act. A. Lockhart. Alt. R. M'Queen, D. Rae.

1769. December 5. JAMES RIDDEL of Crasteir against The MARQUIS of TWEEDDALE.

PLANTING AND INCLOSING.

The clause of the Act 1661, c. 41, respecting Half-dyke, is perpetual.

[*Fac. Coll. IV. 359; Dict. 10,489.*]

AUCHINLECK. This is an excellent statute, obliging every one to bear half-dyke. It is understood to be a subsisting law, and justly and happily so.

KENNET. In the case *Wilson against Sharp of Houston*, it was found by the Court to be a subsisting law. There, an equitable exception if a high road so

unanimously. It is a right judgment. An attempt has been made to distinguish between the case of a horning and of a poinding; but the distinction is not solid. When we attend to the construction of letters from this Court, we must consider them as mandates. If they are mandates, they must be strictly interpreted. Here there is a question not only of *mandatum*, but of *mandata jurisdictio*. No more authority is given than to extricate the jurisdiction. A horning is a single act, wherein a messenger has no means of judging: in an apprising there is a *tractus futuri temporis*; and many things may occur, concerning which the messenger must form a judgment. But, in poindings, or the like, there is no occasion to give him a power to execute against B, when he is ordered to execute against A; nor to execute in the name of B, when he is ordered to execute against A. Where things occur, in which the letters cannot instruct the messenger, he must judge and execute at his peril. The case of *Clapperton* is not to the purpose; for the assignation, on which the diligence proceeded, was amissing, so that the only thing which supported the apprising was long possession: it could not be supported by the assignation, supposing it regular; for no such assignation was produced.

MONBODDO. I always understood that messengers and sheriffs in that part are not different persons. Anciently, sheriffs executed all writs; afterwards, this was confided to messengers: they became sheriffs for a particular purpose. Where execution only is required, the messenger has the executive power alone: in apprisings and poindings, where more than simple execution is required, he has a judicative power. In apprisings, he who obtains assignation, even after assignation may have the possession adjudged to him; and the same ought to be the case as to poindings.

COALSTON. A messenger cannot execute against an heir upon a diligence used against the predecessor: if so, how can he execute for the heir upon the diligence used by the predecessor? If we once depart from this principle, that our letters are a mandate, and to be strictly interpreted, I do not see where we are to stop.

GARDENSTON. I imagined that the usage, mentioned by the Writers to the Signet in 1745, related to arrestments alone, and not to poindings; but now I see the case to have been otherwise, and therefore would alter my interlocutor.

AUCHINLECK. I can see no reason for explaining the powers of a messenger so strictly. This would be a great bar in obtaining justice. The *majus bonum* of the public got the better of *summum jus*, in the case of apprising; why not so also in the case of poinding?

PRESIDENT. The question is, not as to the rights of parties, but as to the method of executing the diligence of this Court. There might be some difficulty in the case of assignees: here the case is as to executors. I have so much regard to practice in matters of that sort, that I cannot consent to alter it. The fixing this point does no harm, whether it be fixed right or wrong; but I do not wish to see vacillancy in our determinations, in matters of form. There is no utility in deviating from the rule by subtle reasoning. I call it subtle reasoning; because the writers, who give their opinion according to the interlocutor, do it not from their own knowledge of the practice, but from an argument in law, drawn from the analogy of the case of *Clapperton*.

the law of deathbed, that I think the trustees ought, from analogy, to be preferred.

COALSTON. Accumulated sums in an adjudication, and whole annualrents thereof, are heritable, and descend to heirs. This rule, established in the case of *Clapperton*, has been followed out in every ranking. As to the effect of the trust-right, George Auchterlony executed a disposition to trustees for purposes to be declared: this was done only by testament. Hence I consider the trust-right as if the trust had been for behoof of himself; which, in the English law, is called a resulting trust. In the late case of *Howie*, there were trustees named, and legacies granted. It happened that a surplus unprovided for remained over. This surplus was found to be a resulting trust to the disponent and his heirs. The annualrent, which fell due before the death of Alexander, and after the death of George, must be regulated by the decision of *Clapperton*; which, in so far, applies. Yet there may be a distinction as to the annualrent which fell due between the death of Alexander and the death of George. This was a liferent in George. It was separated, in his person, from the stock. Now, the profits of a liferent are moveable; and, in this view, they may be conveyed by the testament, and will fall under the right of the trustees.

GARDENSTON. When our countrymen go abroad, and make settlements, I would give effect to their settlements as far as possible, although they may have erred in form. I do not know the history of the case of *Clapperton*; for every decision has its history, whether it passed upon a division or unanimously. I think it is founded on a mere subtlety. As the practice stands, an adjudication is no more than a real security. I am, however, willing to hold the decision in *Clapperton's* case to be law; but I am moved by the specialties mentioned by Lord Coalston.

HAILES. I consider the decision of *Clapperton's* creditors to be a decision in the law of Scotland, and to be the law of Scotland. The favour which is due to Scotsmen who go abroad, make money, and dispose of it informally, does not move me. [When people in foreign parts, at Fort-George or Buenos-Ayres, make erroneous settlements from the impossibility of being properly directed, there may be difficulty; but here there is none.] George Auchterlony, residing at London, might have been advised as to the proper form of executing his settlements. Instead of taking advice from this country, he employed the pen of some uninformed practitioner at London, and the person he employed has committed a blunder: so much the worse for the persons whom George Auchterlony meant to favour; but there is no help for it. As to the trust-right, my only difficulty is, that, if it be sustained, a man *in lecto*, or, at least, in the form of a testament, may elude the excellent law of deathbed.

PITFOUR. As to the interest payable to George during his life; it is true, that, in all cases, bygones are moveable; but, in an adjudication, there are no bygones; there is no more than an eik to the reversion. If I dispoise the tenth part of an adjudication, and retain nine parts, the tenth part will not be varied in its nature from the nine parts which I retain.

PRESIDENT. As to Lord Gardenston's observation: In every testament and transmission of moveables, I would go as far as possible in supporting the will of the testator; but I will never agree to the same latitude as to the transmis-

been so although George Auchterlony had declared the trust upon death-bed. The case of *Forbes* is strong—that of *Pringle of Crichton* does not apply ; for there was homologation by the heir, and, in consequence of it, a renunciation, by the father, of certain reserved rights.

On the 12th December 1769, “the Lords unanimously found that the annualrents, before Alexander’s death, and after George’s death, belonged to the heir : also found, that the annualrents from the death of Alexander to the death of George. Found that the trustees are preferable as to the other subjects in controversy.” [This is the substance of the interlocutor, though not its words.]

Act. H. Dundas. *Alt.* A. Lockhart. *Rep.* Justice-Clerk.

Diss. as to second point,—Kaimes, Coalston. *Diss.* as to third point,—Coalston, Hailes, Monboddoo. *Non liquet*,—Strichen, Kaimes.

Remitted on appeal.

1769. December 13. MARGARET, HELEN, ELIZABETH, MARY, and AGNES SCOTTS against GEORGE CARFRAE.

LEGACY.

A Legacy, left to be divided at the legatee’s death among her children, falls by the legatee’s predecease.

[*Fac. Coll.*, IV. 365 ; *Dictionary*, 8090.]

AUCHINLECK. The 1500 merks, provided by William Scott to his wife, Isobel Swanston, is made payable at the first term after his death, with interest from that term ; “which sum, it is said, the said Isobel Swanston shall leave and distribute amongst her daughters at her death, as she shall think fit.” Isobel Swanston died before William Scott, and consequently the 1500 merks were never due to her ; and, if not to her, neither to the daughters.

MONBODDO. I think there is ground in law for supporting the claim of the daughters to the 1500 merks. It is the same thing as if William Scott had left a legacy to his wife ; whom failing, to his daughters, as she should divide it. “She shall leave.” This shows the meaning of the testator. By the Roman law, this might not have been good ; but, by our law, a legacy, to a person and his heirs, has been found effectual, though the trustee died before the testator.

JUSTICE-CLERK. The 1500 merks is neither more nor less than a legacy to Isobel Swanston, in case she survived her husband. The intention was, that the daughters should continue in some measure dependant on her ; but she predeceased her husband, and consequently the legacy fell. When there is a

L.50. As far as the Court has gone we must go; but there seems no reason for going farther. It is said, "The penalty ought to be ascertained before-hand, because it is impossible to liquidate the damages." This seems to imply that, because you cannot liquidate the damage after, you ought before the offence.

KAIMES. I am only for penalties where, unless they are imposed, damages must arise. That does not seem to be the present case.

KENNET. The vacancies in the cruive-dyke cannot be constantly filled up; so that there is an easy remedy by an application to the Sheriff.

PITFOUR. I am very clear that this practice of inflicting penalties has been the constant practice ever since the year 1665. Those penalties have not been desultory, but regular, increased according to the gradual rise in the value of money. Here there are two different interests—that of the superior heritors and of the public. If the Saturday's slop is not observed, the superior heritors only suffer—and the extent of their damage may be known from the number of fish taken during that forbidden interval. But as to the damage to the public—if the cruives are shut altogether during the whole closetime, it is inestimable. The right of the public ought to be more strictly fenced than the right of individuals. Here is an attempt *funditus* to defeat the purpose of the law. Will you prevent peccadillos, and let capital crimes escape? The refusing to enact penalties will be like granting an indulgence for crimes to be committed, which has not been known in Scotland since the Reformation.

AUCHINLECK. Brotherton has shown his indocility in obeying the law. The filling up cruive-holes must be universally hurtful—making a brae-fishing instead of a cruive-fishing. The only question is as to the Court's power of inflicting penalties. If it has power, it is not rigorous to inflict them. I should doubt of the Court's power, were it not for practice. If the defender does not transgress voluntarily—he will suffer nothing by the imposing of penalties.

MONBODDO. Penalties are unnecessary; for the pursuers have three several remedies:—*First*, They may apply to the Sheriff to stop any unlawful work. *Second*, They may apply to the Sheriff to demolish any unlawful work, if completed. *Third*, They may apply to this Court, on the head of contempt of authority.

JUSTICE-CLERK. Upon the common principles of jurisdiction, a penalty cannot be imposed *quoad futura*, where there is a remedy in course of law.

On the 13th December 1769, the Lords refused to inflict any penalties as to future transgressions, and refused the petition.

Act. H. Dundas. *Alt.* A. Lockhart.

Diss. Auchinleck, Pitfour, Stonefield,

Affirmed on appeal.

less the heritor had come under the obligation to furnish the timber, the tenants would not have agreed to give the rent stipulated in their tacks. The decision in the case of *Calder* is therefore against the defenders.

The following opinions were delivered :—

COALSTON. Why not allow a deduction for moss taken to improve the land, as well as for clay made into brick.

JUSTICE-CLERK. When peats are sold, a deduction is made. But I do not see why there should be a deduction for moss laid on the ground, more than for marle.

AUCHINLECK. If the heritor could say that the moss is only a thing which will last a few years, the titular would not be allowed to consider the benefit thence arising as a permanent rent; but, if otherwise, the heritor will not be allowed to consider it as a casual addition. There may be a reservation, in case the moss run out.

PITFOUR. Peats and brick are not teindable subjects. Here there is no separate subject, but only a manure found upon the lands.

PRESIDENT. Of the same opinion. But I am not for any reservation. Teinds must be valued as they are at the time. If the heritor take a bad time for valuing, it is his own fault.

On the 13th December 1769, "The Lords Commissioners found that no deduction must be given on account of the additional value of the lands from the tenants laying on moss on their lands; but found, that there must be a deduction for great timber, which the proprietors are bound to furnish for the tenant's houses.

Act. A. Wight. *Alt.* R. Cullen.

1769. December 18. ALEXANDER HILL *against* JAMES YEAMAN and WILLIAM HOG.

SALE—WARRANTICE.

In an action of damages upon the Warranty, for the eviction of an heritable subject,—*when* the eviction is understood to have taken place,—and *at what period* the value of the subject evicted is to be regarded, so as to ascertain the amount of the pursuer's claims?

[*Fac. Coll.*, V. 23; *Dictionary*, 16,631.]

MONBODDO. The rule of law is undisputed, that the seller is liable to pay to the purchaser the price as at the eviction. If the delay in the former cause had been owing to the fault of the purchaser, there might be reason for the interlocutor—but the fact is, that it was the seller, not the purchaser, who undertook the defence of the cause. The sequestration decided nothing. The final eviction must be the rule.

The following opinions were delivered :

HAILES. Here an attempt to impose a new burden on tenants. Tenants are in use of assisting the heritors in leading the materials for building the manse, but they are not bound to assist. Great pains has been taken to prove that, by heritors, the law meant tenants. The minister ought to have remembered the Act 1690, which vests the power of choosing a minister in the eldership and heritors. No one ever imagined that the Act comprehended tenants. There are statutes in the reign of Charles II. which make heritors liable for their tenants. The words are totally distinct : as much as heritable and moveable.

AUCHINLECK. The misfortune of the charger's plea is, that it is not only without law, but contrary to law. The law would never have imposed such a constant burden on persons having an uncertain and temporary possession. Expenses ought to be given to the suspender.

On the 18th December 1769, "The Lords suspended the letters, and found expenses due ;" adhering to Lord Elliock's interlocutor.

Act. D. Dalrymple. *Alt.* J. M'Laurin.

1769. December 18. *GEORGE GRANT against DAVID CRUIKSHANKS.*

BILL OF EXCHANGE.

Bill, blank in the Drawer's name, found not to be effectually transmitted by delivery to a Creditor of his, who inserted his own name as drawer.

[*Fac. Coll. V. 25 ; Dict. Appendix I.—Bill of Exchange, No. 1.*]

MONBODDO. This is a blank writ in terms of the statute 1696.

JUSTICE-CLERK. A bill is made payable to me or order. If this bill may be transmitted from hand to hand, and only filled up in the drawer's name when necessity requires, numberless frauds, to the prejudice of lawful creditors, will ensue.

AUCHINLECK. The principle of my interlocutor was, that I do not incline to give new privileges to bills.

On the 18th December 1769, "The Lords found that, as this bill was accepted as payable to Low, the intended drawer, Low's giving the bill to George Grant, his brother-in-law, that he might sign as drawer, was not a habile method of transmitting the contents to George ; and therefore preferred Donald Cruikshanks, on his arrestment, for the two bills which Low owed him ;" adhering to Lord Auchinleck's interlocutor.

Act. A. Wight. *Alt.* J. M'Laurin.

1770. January 17. MRS JEAN HAMILTON *against* MRS JEAN WOOD.

COMPETITION—TERCE.

Competition between an Adjudication and the right of Terce.

[*Faculty Collection, V. p. 27 ; Dictionary, 15,858.*]

PITFOUR. A right of terce is of the same nature with a liferent locality. A localist, if she lays out, loses the rents in time past, and so does a tercer. She can only obtain payment of bygones by adjudging upon the implied warrandice.

COALSTON. The two claims of terce and locality are precisely similar ; consequently, each has a right to levy rents *in medio*. I think, further, that the creditor-adjudger has not right to more than two-thirds ; and that the other third belongs to the widow as terce.

AUCHINLECK. Till a woman is kened in her terce, the subject is in the *hereditas* of her husband, and is affectable by his creditors.

KAIMES. The wife is preferable ; but still, if she does not, the creditors may, as less preferable creditors are received when more preferable do not claim.

On the 17th January, 1770, " The Lords found the widow entitled to the rents *in medio*, in payment of terce, from her husband's death, but not to rents levied by the adjudger ;" varying Lord Monboddo's interlocutor.

Act. Ilay Campbell. *Alt.* J. M'Claurin.

1770. January 26. ALEXANDER BOWER, and OTHERS, *against* RACHEL, &c. BROWNS.

CLAUSE—HERITABLE AND MOVEABLE.

A Deed containing dispositive words, held to be a Disposition and not a Testament : but the words, " Means and Effects, Heritable and Moveable," in said Deed, found insufficient to convey a proper heritable subject.

[*Faculty Collection, V. 32 ; Dictionary, 5440.*]

AUCHINLECK. This deed is so devised as to carry every thing belonging to the deceased. Means and effects will comprehend a house.

HAILES. I doubt as to that. Means and effects cannot, in propriety of speech, comprehend any thing but moveable subjects, and *nomina debitorum*. The

AUCHINLECK. Here is a confession, on the part of the Crown, that the right was not certainly in the Crown. This clause was carried down in the titles of the family till an ignorant doer omitted it. Had the *reddendo*, with the words omitted, continued in the titles for forty years, there would have been prescription in favour of the Crown; but it has been challenged in proper time. The examples produced, of a like clause, confirm the argument; for they relate to church lands, where, notwithstanding the superiority is in the Crown, the feu-duties have been levied by the Lords of Erection. It is the same thing as if the clause had been paying to the King or to Sir John Ker.

GARDENSTON. A proper title, without prescription, will not avail; nor prescription without a proper title. I think the Crown has neither, though both are necessary.

JUSTICE-CLERK. My difficulty still is, that the charter, however erroneous, did nevertheless change the holding from ward to feu. This was, in those days, a great advantage to the family; and the feu-duty stipulated was scarcely adequate. The whole difficulty is from the clause *aliisve jus habentibus pro tempore*. Casualties must be prestable by the vassal to the superior; the superior may nevertheless separate the feu-duties from the superiority, as is the case in church lands, by public law. But what I here desiderate, is evidence that the Crown so meant. There is a clause of the same nature as to the lands of Braxholme, where the Crown had no doubt of its right. The clause, *pro tempore*, seems to refer to something other than absolute perpetual right. If a feu-duty, for its subsistence, required a daily possession, the argument, on the other side, would be unanswerable; but that is not the case.

COALSTON. In 1663, the family of Buccleugh had right to the feu-duties, and the Crown had not, although a charter was taken with a feu-duty, not payable to Sir John Ker, but to the Crown, *aliisve jus habentibus pro tempore*. The question is, What will be the consequence? The charters have been uniformly taken, holding of the Crown, for payment of a feu-duty, in the above terms. It has been found that the right of superiority is in the Crown: if the charter had been taken simply with payment of feu-duties, the right would have been plainly with the Crown, as to feu-duty also,—without possession. I incline to think that the Crown cannot plead prescription in this circumstantiated case. Payment made to the assignees of Sir John Ker would have been good. The present case is the same; for the family of Buccleugh comes in place of Sir John Ker by means of the perpetual discharge.

PRESIDENT. The charter might have been regularly executed by taking up the procuratory of resignation. Be this as it will, the charter is a good charter by prescription. It is probable that the discharge by Sir John Ker was known at the time, and that the feu-duty was made equal to the old 160 merks payable to Sir John Ker. I do not say that the Crown has prescribed a right; but its right is upon the words of the charter. The only difficulty arises from the words *aliisve jus habentibus pro tempore*. If the Crown had meant that the feu-duty should be payable to the family of Buccleugh, the expression is very strange. The words *pro tempore* are probably owing to this, that the Crown meant to make a grant of the feu-duty to the family. But that grant has never been made. I see no equity on the part of the Duke of Buccleugh; for the Crown was certainly entitled to a consideration on account of the great favour

to been understood, that, if a tenant is erroneously warned, or summoned to remove, he is not bound to pay any regard to such warning or summons. He is under no obligation to look out for a new farm; and the law entitles him to sit still where he is, till due notification is again made to him, in terms either of the Act of Parliament 1555, or of the Act of Sederunt. An inept warning cannot be amended *ex post facto*; neither can an irregular process of removing, concluding to remove at a wrong term, be converted, while parties are in Court, into a new process with different conclusions; or, at least, if it can be at all amended, this amendment cannot be drawn back, but ought only to be sustained as a process commencing from the date of the amendment.

The law says, that a tenant is not obliged to remove from his possession unless certain legal forms are used and certain *induciæ* given. If these are not complied with, the whole procedure is null and void, and parties must begin, of new, as if nothing had happened. If it were otherwise, no defender, in a removing, would ever be assolied. For, though the process should be clearly irregular, or the warning absolutely null and void, no matter: if the parties are in Court, the Court may allow all errors to be rectified, and may decern in the removing, just in the same way as if it had been regular from the beginning. This is, in effect, the doctrine which the chargers plead; and it is inconsistent with every principle which has hitherto obtained in removings. If the petitioner is removed at Beltane next, upon a process commenced in August last, he does not obtain the legal *induciæ*; for he has not been summoned in this process forty days before the preceding term of Whitsunday. He is not prepared for removing at the next Beltane; for the inept process, brought against him before Whitsunday last, could not be held by him as a legal certioration. He is entitled, upon the faith of the opinion given by the Court in this very case, to say, that it was good for nothing. It was no intimation for him to remove at Beltane 1770. It was an intimation to remove at a wrong term; and, in other respects, inept and null.

It may be doubted if an inept charge to remove can be at all rectified *ex post facto*; as the statute law of the kingdom requires certain precise forms to be followed out in removing tenants from their farms. But granting, for argument's sake, that it may, still this cannot, either in law or equity, go farther than to hold the solemnities as duly performed of that date on which the due and regular notification is given. The defender referred to the case of the *Duke of Gordon v. M^r Vicar*, in 1769.

ANSWERED FOR THE CHARGERS:—

The question is, Whether the proceedings in this process of removing have been such as to warrant a decret of removing, to take place at Beltane, 1770? It is an undisputed fact, that the process was called forty days before Whitsunday last, which, according to the most critical rules, is forty days previous to Whitsunday before the term of removal, supposing the term to be Beltane, 1770. Consequently, it is apparent that the substantial right and security introduced in favours of tenants, both by the Act, 1555, and the Act of Sederunt, 1756, is observed, according to the interlocutor as it now stands. But it is said, the process of removing is inept, because it charged to remove at Whitsunday 1769, and, therefore, cannot be sustained as an action for

HAILES. My difficulty still is as it has been, on account of the decision of the Court in 1756, *Duke of Gordon* against *M'Pherson* and *Kinguissie*, and the argument, from the analogy of informal warnings there used. A like decision was repeated about 1766, *M'Lean of Drimnin* against *Cameron of Glendissery*.

PITFOUR. The capital argument for the tenants lies in this, that the Act of Parliament requires warning forty days before Whitsunday: If there is a singular term like Beltane, still the general term must be followed; because I must have time to find out another possession. In the case of a tack expiring at Martinmas, you must give a warning forty days before Whitsunday. You must not cut off the *induciæ* by amending the libel, though you may cut off from the form of the action. It has been said, that warning to remove at Whitsunday 1769, implies warning to remove at Whitsunday 1770. *Answer*. The contrary was understood in the Duke of Gordon's case; and, indeed, how can a tenant fix himself in a possession when warned to remove at an uncertain term.

KAIMES. The Act of Parliament can never mean, that, if a man is to remove at Beltane, he must be warned forty days before the Whitsunday preceding. If the term of removing is different from the common term, then we must determine from analogy; *i. e.* forty days before the term.

COALSTON. If that is law, then the Court has erred in ten different cases since I sat here.

On the 6th February 1770, "The Lords repelled the objection; and found that the tenants must remove at Beltane 1770;" adhering to an interlocutor, 19th December 1769.

Act. H. Dundas. *Alt*. Ilay Campbell.

Reporter, Monboddo.

Diss. Pitfour, Coalston, Strichen, Stonefield, Monboddo.

1770. February 13. The ROYAL BANK of SCOTLAND against ADAM FAIRHOLM of Greenhill.

ADJUDICATION.

Stock of the Royal Bank of Scotland adjudgeable:

[*Faculty Collection*, V. 46; *Dictionary*, Appendix I.; *Adjudication*, No. 3.]

MONBODDO. Bank-stock is an incorporeal subject. The pursuers have only a right to the profits accruing to the company, and having *tractum futuri temporis*. Adjudication is therefore the proper diligence. The Act of Parliament, 6th Geo. I., and the charter, speak of attachments and arrestments. Attachments must be something of the nature of arrestments. Strange, if creditors were to be debarred from every sort of diligence. Yet this is the argument for the Bank.

PRESIDENT. If the argument for the bank is good, every Peer ought to vest his estate in bank-stock. His person is safe by law; his stock is secure from arrestment by the charter and from adjudication by the argument for the bank.

PITFOUR. I do not doubt of the power of the king to grant the charter. The clause subsists as long as a man is in life, and can transfer; but, if a man can no longer transfer, there must be another remedy. Adjudication is all that we have for a herry water-net; many subjects, not strictly heritable, may be carried by adjudication; such as the *jus mariti*, &c. There are declaratory adjudications known in law; because, where there is a right, there must be the means of explicating that right.

On the 13th February 1770, "The Lords found the bank-stock adjudgeable."
Act. R. M'Queen. Alt. A. Lockhart.
Reporter, Pitfour.

1770. February 4. JANET THOMSON *against* HUGH M'KAILL.

PACTUM ILLICITUM.

A marriage-broriage obligation *contra bonos mores*, and not actionable.

[*Fac. Coll. V. 50; Dictionary, 9519.*]

PRESIDENT. The first question is, Whether is this obligation actionable? *Second*, Whether Janet Thomson has performed? As to the first, the stipulation is *contra bonos mores*: In giving any one assistance towards matrimony, there must be no lucrative stipulation. It is *turpe* to bargain money. The consequences must be fatal to society. It is a shameful trade, no matter whether concerning a match with one woman or with any woman: In both cases the match-maker is *maquignon de chair humaine*. I will say nothing of the decree of the House of Peers, in *Lady Mary Herbert's* case. That house may decide upon large principles of equity; but I think the Chancellor's judgment was right. This negotiation was carried on without the approbation of some of the parents. The young woman's father knew nothing of it. Dallas urged on the poor weak lad. He, in effect, says,—“Marry the woman against her father's will, or without his knowledge:” that is, “Be as unhappy as you please, provided I get my nine guineas.” Plain that M'Kaill knew nothing of the marriage till after it was consummated. The young woman also was deceived by false representations of the state and fortune of the young man. I also doubt as to the condition of the contract being fulfilled. By the condition, a marriage-contract was required, and this implied the consent of parents.

COALSTON. No argument has been pleaded, here, in support of the obliga-

tion, which might not have been equally pleaded had the bargain been made to get a footman married to the lady of the highest rank in the kingdom.

KAIMES. M'Kaill ratified the marriage. This might have been sufficient, had the question been solely with respect to implementing the condition ; but the obligation itself is *contra bonos mores* ; for the implementing could not be without dissimulation and guile. Janet Thompson could not say to the young woman, "I am to have nine guineas if I can conclude a match between you and Walter M'Kaill." She was therefore bribed to act falsely, and falsely she acted.

On the 18th February 1770, "The Lords found that the office undertaken by the pursuer, in terms of the missive, was *contra bonos mores* ; refused action, and found expenses due."

Act. R. Sinclair. Alt. G. Ferguson.

Reporter, Kaimes.

1770. February 14. ALEXANDER MUIR *against* JAMES WALLACE.

WRIT—LOCUS PŒNITENTIÆ.

A Writing, neither in terms of the Act 1681, c. 5, nor holograph, insufficient to constitute a bargain as to heritage, though the subscription was acknowledged.

[*Faculty Collection*, V. p. 60 ; *Dictionary*, 8457.]

COALSTON. I doubt how far the acknowledgment of the subscription is not sufficient to remove the objection of a statutory nullity. Solemnities were required for preventing forgery, and, when the subscription is acknowledged, that reason of the statute ceases.

PRESIDENT. The contrary was found in the case of *M'Kenzie* and *Park*, very deliberately determined. When land is to be conveyed, it is expedient to adhere to our feudal rules.

HAILES. I have good reason to remember the case of *M'Kenzie* against *Park*. I was lawyer in it on the losing side. I observe some commendations bestowed on a paper signed by me in that cause. I do not deserve it ; for the paper was not composed by me, but by a person whom I am not at liberty to name, (Lord Kaimes). At the time, I own I did not digest the decision ; but it has been uniformly followed, and I consider it as a safe rule.

MONBODDO. If it is once admitted that an heritable subject may be conveyed by the form of missives, I cannot distinguish between a missive holograph and one where subscription is acknowledged. This was a solemn transaction, and it is no modest or ingenuous plea which the defender urges. As to this point, there are decisions, old and new, which run contrary. I therefore find myself at liberty to determine according to principles.

PITFOUR. If we allow the solemnities of writ to be given up, we defeat the security of the law. The frequency of disputes like the present leads me to be more studious to support the law, otherwise we should sap the foundations of legal securities. Our ancestors, when writing was less common, subsisted well with all legal solemnities; why may not we, when writing is become more common, and instrumentary witnesses may always be had? There are only two cases where this solemnity is dispensed with,—where fraud can be alleged, or where there is *rei interventus*.

KENNET. The law admits *locus pœnitentiæ* till a written obligation is completed. So, the acknowledging a subscription is not sufficient, but leaves matters just where they were.

KAIMES. I am tired with opposing a number of decisions which I think totally wrong. Were those decisions limited to land-rights, it would be less matter: if they are extended to every case, they will destroy the morals of the nation. It is an infamous plea for a man to urge the force of a statute *contra bonos mores*: How can a Court of Justice, established by the public, ever give sanction to so unjust a defence?

PITFOUR. If, by the law, a bargain cannot be established without a writ, there is no reason for disappointing the law, in order to establish a bargain. In some cases the law allows a *locus pœnitentiæ*, that a man may be freed from a rash obligation, but which still may be an obligation in conscience.

JUSTICE-CLERK. Were we to consider this case without reference to statutes and decisions, we would certainly determine according to the rules of good faith. We have often the mortification to be obliged to give decreet where the plea or the defence is ungracious and against good faith. This decision will not affect moveables: it relates only to the conveyance of heritable subjects, or to an obligation to convey, which is equivalent. A long tack of lands is an heritable right. An adjudication of it is an heritable title. I cannot distinguish between a large subject and a small one; between recent adjudication and one whereof the legal is near expired.

AUCHINLECK. Were the question concerning a moveable subject, I should have no difficulty in determining the letter to be binding. Here a man comes against his own agreement; but, suppose there were a formal verbal agreement, this is as binding in the conscience of an honest man;—and yet we would not hesitate to say there is *locus pœnitentiæ*, although this is equally against conscience. Here the defender takes advantage of the law of the country. This is not more revolting against conscience than the other, which is equally founded on the law of the country.

COALSTON. Put a case.—A deed signed before witnesses is not good unless duly tested. A man grants a disposition of his lands,—it bears payment of a price,—I pursue for delivery: The party says,—The deed is null, for one of the witnesses did not see me sign. Would this defence be sustained?

PRESIDENT. In that case there might be a *rei interventus*; besides, it may be urged, *non deficit jus sed probatio*. The case which has occurred, will occur seldomer if we hold by the decisions.

ELLIOCK. When this case was before me, I did not consider it as relating to

a subject of much importance ; being as I imagined, the adjudication of a tack which might expire to-morrow.

On the 15th February 1770, " In respect that the missive relates to an heritable subject, the Lords found it not probative ;" altering Lord Ellick's interlocutor.

Act. J. Boswell. *Alt.* A. Lockhart.

Diss. Kaimes, Coalston, Monboddo.

1770. February 15. ANDREW STEWART *against* JAMES BISSET.

COMPENSATION—RETENTION.

A Creditor, when a sum of money was sent by his Debtor, and received, in order to be applied to a particular purpose, not allowed, upon the Bankruptcy of that Debtor, to plead retention of the money, or to apply it in compensation of his own Debt.

(*Faculty Collection*, V. p. 58 ; *Dictionary*, App. I. *Compensation*, No. 2.]

HAILES. The only difficulty seems to be that Bisset, not finding the bill in the hands of Coutts, notified to M'Donald, 3d November 1763, that he had placed the L.18 to the credit of M'Donald, and that M'Donald seems to have acquiesced in this transfer.

MONBODDO. M'Donald had no occasion to write any answer. As he had given the order to pay, and Bisset agreed,—from that time the holder of the bill became proprietor of the L.18. Bisset, therefore, was *in mala fide* to apply it to his own use.

JUSTICE-CLERK. It is a particular thing to put money into the hands of a man not to be applied to A or B, but to the holder of a bill in general. Bisset followed the faith of M'Donald, and went to Coutts to pay the money. Coutts could not take it, not being possessed of the bill. Bisset writes to M'Donald,—states the fact,—and adds,—I state it to your account. M'Donald makes no answer to this. This seems an acquiescence on the part of M'Donald.

KAIMES. The question is—To whom did the property belong ? The money was M'Donald's till Bisset paid it ; but afterwards M'Donald said he had ordered it to be paid to Stewart. This was a transference. Bisset may have wrote, or may not have wrote the letter to M'Donald—or the letter may have miscarried. [It was wrote ; it did not miscarry.] Suppose Stewart out of the question, any creditor of M'Donald's might still arrest it.

PITFOUR. I think Stewart had a *jus quæsitum*.

COALSTON. Bisset undertook a trust. As soon as that was intimated, M'Donald could not recal it.

PRESIDENT. This was a trust in favour of the porteur.

On the 15th February 1770, " the Lords found Bisset liable to Stewart in the money ;" altering the interlocutor of Lord Ellick.

Act. Cosmo Gordon. *Alt.* J. M'Claurin.

1770. *February* 16. MRS AGNES STEWART of Phisgill *against* The EARL of GALLOWAY and OTHERS.

INHIBITION.—ARBITRATION.

Effects of a submission and decret-arbitral upon an inhibition raised upon the dependance of the actions submitted, but in which no notice was taken of the inhibition.

[*Faculty Collection*, V. p. 55 ; *Dict.* 7004.]

MONBODDO. Our law has the remedy of inhibition, both upon claims liquid and illiquid. When liquid, upon decret; when illiquid, upon dependance. Here the claim was liquid upon decret-arbitral. The creditors are not affected by the decret-arbitral. Mrs Agnes Stewart might have insisted on her original grounds of debt, and restricted herself to the decret-arbitral. The creditors, if they had no objection to the decret arbitral, could have no reason for complaining. There is only one decision of the Court to the contrary: *June* 1751, *Gabriel Napier*. And one decision does not move me.

COALSTON. I incline to be of the opinion given by the Court in *Gabriel Napier's* case. The law of this country allows arrestment and inhibition on a dependance. The only purpose is to secure what may be found due upon the dependance. In all suspensions, a few excepted, caution is found; but that only relates to what is determined by the Court. If parties transact, the caution flies off. The interlocutor of the Ordinary goes too far in finding the action sopite. The parties may still waken their process, and insist for their preference, to the extent of the decret-arbitral.

JUSTICE-CLERK. Of the same opinion. Mrs Agnes Stewart cannot go into the multiplepointing and claim a preference there; but she may go into her own process, and restrict her debt; and upon that restriction take decret, with security of inhibition.

On the 16th February 1770, The Lords "found the sum awarded by the decret-arbitral not secured by the inhibition, but without prejudice to waken and insist in the former process, and there to claim preference upon the inhibition, as accords:" varying Lord Auchinleck's interlocutor.

Act. A. Lockhart. *Alt.* R. M'Queen.

1770. February 20. ROBERT WILLOCH *against* JOHN OUCHTERLONY.

HERITABLE AND MOVEABLE.

Arrears of Interest upon a Debt secured by Adjudication, heritable, and not transmissible by Testament.

A Disposition on Trust, the purposes of which were only thereafter declared in a Testament, but for which there was a reservation in the Trust, held to be a sufficient conveyance of heritable subjects.

[*Faculty Collection*, V. 18 ; *Dictionary*, 5539.]

MONBODDO. I have always understood the law to be that no heir can be prejudiced by a deed executed on death-bed, or in the form of a testament, although *in liege poustie*. In the conveyance of our heritable property, it is no wonder that a particular form of words should be required, as in the Roman stipulations. This rule admits of two exceptions, and no more. *First*, In a disposition to a third party, with a power to burden, that power may be exercised on death-bed, or in a testament ; because the heir, *ab ante* deprived of the succession, is not thereby prejudiced. *Second*, If the disposition is to the heir, and he accepts, as was the case of *Pringle of Crichton*, this also good against the heir, who cannot challenge what he himself does. If, in this case, the trustees had any right to the subject independent of the testament, it might be good ; for the trustees do not object. But this rule does not apply ; for, if there had been no testament, the heir-at-law, not the trustees, would have had the right. The trust can only subsist *quoad* the creditors. Ouchterlony plainly professes his intention to transgress the law of his country. By this way a man may make a trust-deed without uses declared,—may keep it by him,—then execute a testament declaring the uses, and so disappoint the law. The case of *Forbes* was particular : the faculty was in the marriage-contract ; and the provision to the younger children, in consequence of that contract, was, by the House of Lords, considered as a debt. In the case of *White*, posterior to that of *Forbes*, the Court found that provisions could not be made to children by heritable bonds on death-bed.

JUSTICE-CLERK. The trust-deed feudally divested the heir of the estate and transferred it to others. The trustees might have procured themselves infeft on it, and taken it out of the *hereditas jacens* of Ouchterlony. In pursuance of this deed, Ouchterlony, being in England, says the trust shall be further burdened with legacies, &c. Any probative writ would have been good to carry the legacies. He did the same thing *in liege poustie*, under the form of a testament. It would expose the law of death-bed, and make it odious in our neighbouring country, were this deed to be held ineffectual.

COALSTON. The law of death-bed is essential to our law and constitution, and, till altered by the legislature, must be supported. It consists of two parts :

1st, That the heir cannot be prejudged by a gratuitous deed on death-bed : 2d, That the heir cannot be disappointed by a testamentary deed. The trust-disposition did not prejudice the heir ; for, if no subsequent testament had been executed, the heir would have taken the estate : it therefore follows that the interlocutor allows the heir to be prejudged by a testament. I admit that all this is a subtlety in our law, without sufficient reason : it is not only a subtlety, but a snare. I wish to see it removed ; but I cannot remove it.

BARJARG. The only objection here is as to form, which, I think, is removed by the trust-deed which denuded Ouchterlony.

GARDENSTON. In construction of law, a testament is a death-bed deed, though executed *in liege poustie* : yet there is a distinction made in the practice of the Court. If any word in a deed *in liege poustie* can infer a disposition, it will be good ; and where is the difference here ? If the testament had been first, and the trust-deed came afterwards referring to the testament, would it not have been effectual ? And where is the difference here ?

PITFOUR. I agree with the esteem expressed for the law of death-bed as to its substance. As to its form respecting also testamentary deeds, that also is established in law. Here Ouchterlony disposes his estate to trustees for uses to be hereafter declared : against this there is nothing but strict form. It is the same thing as if he had referred to a writing under his own hand : and here is a writing.

On the 20th February 1770, "The Lords sustained the defence against payment of the L.4517 ; and found that it was carried by the trust-right ;" adhering to interlocutor of 12th December 1769.

Act. A. Wight. *Alt.* H. Dundas.

Reporter, Justice-Clerk.

Diss. Coalston, Hailes, Monboddo.

Remitted on appeal.

1770. February 21. HOUSTON STEWART NICOLSON, Esq. *against* MRS MARGARET PORTERFIELD.

PROCESS—ADULTERY.

The pursuer of a divorce for adultery must condescend specially upon the person with whom the crime is supposed to have been committed.

[*Faculty Collection*, V. 62 ; *Dictionary*, 12,639.]

HAILES. The judgment of the Commissaries is consonant to practice and to reason. The same judgment was given by this Court in the cases of *Dor-mont* and *Cuninghame*. The judgment in the case of *Michie* was not different ; for there the husband was abroad, and could know nothing of his wife's gal-

lants. The Court would not require impossibilities, nor oblige a man to condescend upon what he could not know—but it required his doer to declare that he could not condescend more specially than he had already done.

BARJARG. There is no reason for concealing the man's name when known, and when the pursuer restricts his libel to the proof of guilt with that particular man.

JUSTICE-CLERK. The excellent statute of James VI., 1606, would be eluded, were parties allowed to go on in prosecutions without mentioning names.

COALSTON. This action comes as near a criminal action as can be. The lady is entitled to the privileges of a criminal. When no person objects, an action of divorce may go on without the mention of names: not so, when a more particular condescendence may be given, and is required.

GARDENSTON. My difficulty lies here:—if the man is pointed out, how can he be made a witness and obliged *jurare in suam turpitudinem*.

PRESIDENT. By the old practice of the Commissary Court, a pursuer was not obliged to condescend. But the contrary was solemnly determined in the case of *Cuninghame*. This case is still stronger: the person described as the gallant is said to be a person of low rank. If the pursuer means to avoid condescending, merely with the view of bringing this nameless low person as evidence, this would be dangerous indeed, and make way for too easy conviction, in so atrocious an accusation as that of adultery. There is no danger from the action of damages, which the pursuer says may be brought by the supposed gallant, if the proof should prove insufficient. For, if a husband shows that he had a probable cause of suspicion, no damages will ever be awarded; and, if he has no probable cause, there is no reason why he should not be exposed to damages.

On the 21st February 1770, “The Lords refused the bill of advocacy.”

Act. A. Lockhart. Alt. Ilay Campbell. Rep. Monboddo.

1770. March 2. DAVID ROSS *against* ELIZABETH ROSS.

CLAUSE—GENERAL ASSIGNATION.

A general clause for “Goods, gear, debts, &c., and all other effects of what nature or kind soever,” in a disposition, held insufficient to convey heritable bonds and adjudications.

[*Fac. Col. V. 71; Dictionary, 5,019.*]

GARDENSTON. It is a rule of law, that deeds disinheriting a son, especially an eldest son, are to be strictly interpreted. This is a hard-hearted deed. I do not doubt of intention; but that is not enough. It is probable that the testator did not advert that he had such subjects. The late case of *Bower* was still narrower than this, and yet the Court found for the heir-at-law.

AUCHINLECK. This is an unnatural deed ;—a man, thinking of death, and going out of the world with so deep a resentment against his son. My difficulty is here—there is a conveyance of the whole effects of every kind and denomination. There was no occasion to make a particular enumeration of heritable subjects. Whole effects comprehends heritable bonds.

PITFOUR. We are bound to give a fair effect to deeds, however much we may dislike them. Yet I do not think that this deed carries the heritable bonds and securities. It is an important principle, that general words are not to be extended from an idea of intention. A general discharge, or a general submission, is a favourable deed as tending to sopite pleas. Yet a discharge or submission, as general as the clause in question, would not reach to heritable property.

COALSTON. If Alexander Ross had conveyed his whole estate, heritable and moveable, excluding his son, the conveyance would have carried every thing. But it is a general rule, that whenever a man conveys a subject specially, and then adds a general clause, that general clause is not to be extended beyond what is conveyed specially. The particular subjects conveyed are plainly moveable. The express “all other effects” cannot go farther. Perhaps the shocking irrationality of the deed may influence my judgment.

MONBODDO. Whatever the meaning of the words “goods, gear, and effects” may be in a neighbouring country, I am satisfied that, by the law of Scotland, they do not comprehend heritable subjects. What the intention of the testator was, I do not know.

JUSTICE-CLERK. The general strain of the deeds looks like an intention to exheredate the eldest son entirely, and yet there are words in the deed inconsistent with this notion. It is surprising that a man skilled in Scotch conveyances should have omitted to use proper words for disposing heritage. The clause of exheredation relates to the lands only. My opinion is confirmed by the clause conveying the evidents : for there he applies himself to the double settlement which he has been making ; and as he made separate conveyances of the lands and moveables, so he makes separate conveyances of the evidents respecting the one and the other.

PRESIDENT. At first I thought that the intention was to convey all : but, upon reconsidering the case, I am for adhering to the interlocutor of the Ordinary. I am not bound to account for the omission of any subject. The letter of the 6th October shows that Ross imagined he had little or nothing to leave but the farm of *Little Dean*. In his whole deed he does not say a word of debts to be paid. The deed consists of two parts : *First*, The lands of *Little Dean* ; *Secondly*, *Goods, &c.* All effects must be explained by what went before. It never can imply heritable subjects of more value than his land estate specially conveyed.

There are two parts also in his assignation to evidents. The same idea is followed out in the whole.

On the 2d March 1770, “the Lords found that nothing was conveyed to the defender except the lands of *Little Dean* and *Mayblainie*, and the moveable goods, gear, and effects, which belonged to Alexander Ross ; and that there are no general clauses in the deed sufficient for conveying to the defender any

other heritable subjects belonging to him ; and therefore reduced the rights in the person of Elizabeth Ross ;" adhering to Lord Kennet's interlocutor.

Act. A. Lockhart. *Alt.* D. Rae.

1771. April 10, 11. Affirmed on appeal.

1770. March 8. THOMAS SCOTT *against* SIR THOMAS FLUDYER and COMPANY.

ARRESTMENT.

An arrestment at the Market-cross of Edinburgh, Pier and Shore of Leith, against the common debtor's debtor, a Scotsman, living abroad, found ineffectual, as the money had been afterwards, *bona fide*, remitted to the common debtor, in ignorance of the arrestment.

[*Faculty Collection*, V. p. 80 ; *Dictionary*, App. I. *Arrestment* I.]

MONBODDO. I understand that arrestment gives a *nexus realis* : It was so determined in the case of *The Earl of Aberdeen*, 1738. An argument there used was thought conclusive—that an arrestment in the hands of the defunct was preferable to a confirmation by the heir. Suppose a *corpus*, such as a quantity of tobacco, arrested in the hands of Tait, and that the *corpus* should come into the hands of Marshall, agent for the creditors, and be there arrested, the arrestment in the hands of Tait would be preferable. If you once hold that there is a *nexus realis*, suppose the agent to convert the *corpus* into money, the case would be the same, if there is such a thing as a *surrogatum* in law. The only difference between the supposed and the real case is, that a bill was sent instead of goods.

JUSTICE-CLERK. An arrestment at market-cross, pier, and shore, is a valid diligence against all Scotsmen, and may be made effectual ; but I would be sorry that it should have any effect before it came to his knowledge. Here Tait knew nothing of the arrestment, and, therefore, cannot be liable in second payment. If Tait had sent cash, and Herries had given it to his agent upon bond or note, would not this have discharged Tait and constituted an obligation against the agent ? Such is the case here. The two arrestments are not *ad idem*. Scott's arrestment in the hands of Tait will not carry money in the hands of Marshall.

PITFOUR. If arrestment at pier and shore is good, then all Lord Monboddo's argument is demonstration. Here the subject is still extant : action lies against Tait for breach of arrestment. Tait's defence is, I sent the money home *bona fide*, not knowing of the arrestment. The arrester may answer, All this is well ; but you have an action of forthcoming against Marshall : the debt is still *in medio*. I can force you to assign to me that I may chase the money, into whose

hands soever it comes. I must hold the subject assigned ; because the party in whose hands it is, is in process, possessed of the subject.

COALSTON. This seems to carry the effect of arrestment farther than ever carried. Arrestment at pier and shore has the same effect in competitions as arrestment in the hands of the debtor. Arrestment obliges to make forthcoming : it gives a *nexus realis* while in the hands of the arrestee. In the *Earl of Aberdeen's* case, arrestment was found effectual even against the heirs of the arrestee. If we go farther, where shall we stop ? If arrestment gives any further *nexus realis*, it will follow that, had Tait sold the subject, it might have been repeated from the buyer. The moment that the money comes into the creditor's hands, the arrestment will be ineffectual : Here the same thing occurs ; for the money was put by Herries, the creditor, into the hands of Marshall. Suppose this money had been paid to a creditor, will it be said that it might still have been repeated ? This would be to introduce a new and unknown hypothec into the law.

PITFOUR. The money coming out of Herries's hands would not disappoint the arrestment.

AUCHINLECK. Had the goods remained in Tait's hands, the arrestment would have been good ; but Tait paid, and there is an end of the arrestment. My brother talked of a *nexus realis* : are we to examine a bag of money like an heritable estate, and trace the progress of it through fifty hands ?

PITFOUR. The error of the argument lies in this, that it is supposed that a debtor pays by giving an order to pay.

PRESIDENT. I should be diffident of my opinion, when one of my brethren (Pitfour,) delivers a contrary opinion with so much perspicuity, and another (Monboddo,) with so much positiveness. The arrestment in Tait's hands is good, from considerations of expediency to commerce : an arrestment, in a person's hands, prohibits him from alienating to the prejudice of the arrester, under the penalty of breach of arrestment. In the case of *Lord Aberdeen*, the subject was considered either to be *in hereditate jacente* of the trustee, or *in medio* in the hands of the heir, the representative of the dead arrestee. This was found to be an effectual *nexus*, in order to preserve the effect of legal diligence. The argument is erroneously stated in the Dictionary, for there was no mention of *nexus realis* in the argument. It was the first cause that I ever argued ; and, being young and keen, I was much interested in the decision, and remember its circumstances. After Tait had paid *bona fide*, how can a *nexus* subsist ? This would be establishing a *jus hypothecæ*.

PITFOUR. Though Tait paid *bona fide*, he still had action against Marshall not to put the money away.

GARDENSTON. My idea of the effect of an arrestment is this, that it gives a right to make forthcoming wherever the subject is to be found.

JUSTICE-CLERK. But here is a *medium impedimentum*,—the arrestment by Sir Thomas Fludyer in the hands of Marshall.

On the 8th March 1779, " The Lords preferred Sir Thomas Fludyer in the arrestment in the hands of Marshall ;" adhering to Lord Elliock's interlocutor.

Act. A. Lockhart. Alt. H. Dundas.

Diss. Pitfour, Gardenston, Monboddo.

Pitfour was uncommonly earnest in this case, replying upon every body ; and yet the more I reflect upon the decision, the more I am convinced of the justice of the decision. Monboddo told me, that the subject was not *in medio* while in the hands of Herries, but became *in medio* as soon as Herries put it in the hands of Marshall.

1770. January 25, February 13, and March 8. MANSFIELD, HUNTER, &c. against DONALD MACILMUN.

BILL OF EXCHANGE.

Privilege of an Onerous Indorsee.

[*Faculty Collect. V. 85 ; Dictionary, Appendix I. ; Bill of Exchange, No. 2.*]

COALSTON. The remedy proposed by the chargers is worse than the disease. To rest upon the oath of the holder is too much,—an oath *ex parte* where the creditors are not parties. I do not see how the holder, deponing *negative* as to the whole, could afterwards be examined upon special interrogatories. Were caution offered to account with the creditors, the bill might be refused.

PITFOUR. This matter of discounting bills is of great moment to trade, and necessary for its existence. When there is no bankruptcy of any intermediate person, there can be no occasion for suspension ; for, unless in case of such bankruptcy, arrestment can have no effect. Here the bill was indorsed seventy days before the bankruptcy ; and, consequently, no pretence of the Act of Parliament 1696.

ELLIOCK. If we were to lay down rules as to the discounting of bills, &c. it would be *altioris indaginis*. Here is a notour bankruptcy. A bill is indorsed by the bankrupt before it is due. His creditors arrest. The acceptor can know nothing of the connexion between the bankrupt and the holder of the bill. He properly brings a multiplepoinding, and suspends. The persons interested in the oath proposed to be taken by the holder, are the arresters. And they are not in the field until the multiplepoinding is called.

AUCHINLECK. I am no favourer of this kind of security. If all dealers in bills were like Mansfield and Hunter, there would be no danger. This, however, is not the case. And, as matters now stand, a bankrupt, according to the charger's argument, has nothing to do but to get a good swearer to hold his bills ; and thus one dishonest man colluding with another may cheat the whole nation.

PRESIDENT. I am always afraid of determining upon general questions of commerce, where one has a natural bias. The benefit of defence against payment to the holder must accrue to the arrester. There is no *mora* here on the

part of the acceptor of the bill. He instantly raises a multiplepinding. If the arresters do not compete, the holder will be preferred. If they do, there is good reason for passing the bill of suspension. A decree of this Court, *parte inaudita*, will not be good against arresters. I am not clear that caution is sufficient here; for we ought to adhere to general rules, applicable to every dealer, as well as to Mansfield and Hunter.

KAIMES. I am sorry to see difficulties and dangers on all sides. I am not ripe for determining the general point; and, as there is here a bankruptcy, I would pass the bill.

GARDENSTON. I would refuse; for it is a general rule, that a bill, while current, must meet with no stop.

On the 25th January 1770, "The Lords passed the bill upon caution."

On the 13th February 1770, adhered.

Diss. Pitfour, Gardenston, Kennet, Barjarg, Monboddo; [Justice-Clerk, a party's brother, Strichen, Alemore, absent.]

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered :—]

March 8th.—MONBODDO. Payment, made by authority of this Court, is *bona fide* payment, and will excuse the acceptor of the bill from second payment. If Mansfield and Hunter are trustees for the bankrupt, the arresters will have recourse against them. The oath required is an oath *ex officio*, in order to ascertain that the indorsation was in way of commerce. The favour of commerce is such that many things are allowed among merchants contrary to the common rules of law.

AUCHINLECK. General principles of law are not to be overturned in order to suit the conveniency of gentlemen who choose to follow a particular branch of trade. It is here proposed to render the diligence of arrestment ineffectual.

KENNET. Bills, while current, are not liable to suspension, unless you prove by oath that the bill is not for value. In such circumstances as the present, there is little danger of collusion.

COALSTON. There are inconveniences on both sides. They may be avoided by a small alteration in form. Whenever there is double distress, a debtor cannot pay safely unless upon a multiplepinding. Bills are not excepted from this rule. From the increase of trade this must occasion great inconveniency, expense, and delay. Yet I cannot take upon me to alter what the law has fixed. Wherever there is commerce, there must be bankrupts. Wherever there are bankrupts there will be attempts to disappoint the law; and there is no method of this so easy as by indorsing bills. The remedy of the indorsee finding caution is not convenient; for he may be an honest man, and yet not be able to find caution. The oath *ex parte* is something hard to be got over as a proper rule. It might be expedient, by Act of Parliament, to provide that the bill of suspension be intimated to all the arresters, upon a short day, with power to the Ordinary on the Bills to take the oath, and determine as to its import.

BARJARG. If the law of merchants is universally understood to be, that arrestments do not stop the currency of bills, I would follow that law.

PITFOUR. Upon the decision in this case depends the commerce of this country. No principle of law stands in the way of the opinion I am to give. If the Bank of England were to stop the discounting of bills for two days, universal bankruptcy would ensue, and we should hear of real instead of imaginary grievances. We have all seen the benefit of cash accounts with our banks: the practice of discounting bills is still more beneficial. It affords a daily mint to merchants for converting effects into money. A delay of the currency of bills for a single day might prove fatal. The principles of law are clear; for a bill indorsed upon immediate payment of money is equivalent to money: There is no exception but what may be made out by writ or oath of party. An arrestment has no hold of such a bill. Besides, this bill was transacted 70 days before the term of legal bankruptcy. Suppose the bill to have been transacted but the day before real bankruptcy, this would make no difference, unless fraud were alleged.

PRESIDENT. *Quot homines, tot sententiæ.* When my learned brother says that a thing is law, I must, with difficulty, oppose my opinion to his. We are to try this case, not as the case of Mansfield and Hunter, but as the case of one suspicious in his character and circumstances: it comes to this, that every man may, by his own oath, secure a subject against creditors who are not in the field. The oath administered to the holder of a bill is not an oath *ex officio*. An oath, *ex officio*, is for expiscation in order to judgment, and proceeds from the judge's own motion. The acceptor of the bill, in this case, has no concern what the oath is. Who is to produce the writ in order to show the trust? Not the arrestee, but the arrester. The arrestee neither has nor can have the writ: the arrester may have it, and yet we will not hear him. There may be inconveniences on the other side; though, I must say, that I do not know that cash accounts, or any thing of the kind, have proved so exceedingly advantageous; nor do I think that dealers in money are the most useful traders in a nation. Is it possible to maintain that there is no method of affecting a bill? There may be trust,—there may be falsehood,—still there may be inconveniences; but they will not alter the law. If a remedy is necessary, it may be applied. Even an Act of Sederunt, as proposed by Lord Coalston, may do. If you once bring parties into the field, my argument ceases; for bringing them into the field, even an edictal citation may be sufficient; because parties arresting must be supposed to have procurators in this country. A payment, by authority of this Court, is, in one sense, a *bona fide* payment; but I should have difficulty to find it good against a third party not in the field.

GARDENSTON. I am not for introducing new law; but I am persuaded that no merchant will say that arrestment can have any effect in this case. Mansfield and Hunter should not have offered to make oath; for arrestments can never compete with onerous indorsees. If the debtor in the bill says, trust or not onerous, he must prove his allegation.

ELLIOCK. Inconveniences ought not to abolish the laws of the land; neither ought the opinions of money dealers. The parties here force the Court to give a determination on a general point without necessity. Mansfield and Hunter might have drawn their money before this time in the multiplepoinding.

On the 8th March 1770, "The Lords altered and remitted to the Ordinary to refuse the bill."

Act. R. M'Queen. *Alt.* J. M'Laurin.

Reporter, Hailes.

Diss. Coalston, Auchinleck, Elliock, Hailes, President. Justice-Clerk did not vote.—*Absent,* Kaimes, Alemore, Stonefield.

This question interested the merchants very much ; and they are said to have been clamorous without doors against the first interlocutor. The President observed that there were no *termini habiles* for putting any oath to Mansfield and Company ; for that the debtor in the bill had not the same interest in requiring that oath which the arresters might have had, upon being admitted into the field : and thus, the holder of a bill may exact payment, although he should in reality be no more than a trustee. The President also said that this single decision should never be considered by him as establishing the law. There was rather more warmth in agitating this question than might have been wished.

1770. June 13. GEORGE CAMPBELL *against* JOHN CAMPBELL of Ottar.

CLAUSE—PROVISION TO HEIRS AND CHILDREN.

Interpretation of Clauses in a Contract of Marriage, containing a special provision, and providing the conquest to the Heirs of the Marriage.

[*Faculty Collection, V. 87 ; Dict. 13,020.*]

PITFOUR. The writings for proving the causes of complaint against George Campbell are incompetent, because not produced before the Ordinary ; and irrelevant, because such causes of complaint will not authorise exheredation. As to the 8300 merks, 5000 merks were paid to the daughter as tocher. Here there was not a provision to the heirs-male of the marriage ; but a provision to the heirs of the marriage, of a sum of money, by one who had no estate : I would therefore deduce the 5000 merks, but not the sums allowed to the son. Even in the case of collation, nothing comes in that was considered as sustenance : and here there was very scrimp sustenance. [Afterwards, moved by the arguments on the bench, he thought that the 5000 merks did not impute.] Lands purchased by money, to which one has succeeded, is conquest ; as much as if the lands had been purchased by borrowed money. The succeeding to an adjudication is just the same as succeeding to an heritable bond. The adjudication could not be the capital title ; for it extended over the whole estate of Tarbet. It is impossible to say that the legal, while not expired as to the whole, was expired as to a part.

MONBODDO. I do not think that the father had a power of punishing the son, however profligate, by taking his property from him. I doubt as to any

defalcation of the 8300 merks provided to heirs of the marriage. This expression must mean the son to the exclusion of the daughter; and, therefore, the provision of 5000 merks was no exercise of a power of division. The lands were bought from Tarbet; the adjudication was not the capital title, nor the purchase an additional acquisition to the adjudication. I am of the same opinion as to the lands acquired in 1708: it matters not by what money they were purchased.

KENNET. The special provision of 5000 merks is not good against the heir. It was provided to be secured heritably: small payments to the son are not to be considered as implement. But, if the father purchased lands to a greater extent than 8300 merks during the subsistence of the marriage, this should impute as implement of the clause providing 8300 merks to the heirs of the marriage, to be laid out on land, &c.

HAILES. This proposition seems most equitable. In 1700, Mr John Campbell provides 8300 merks to the heirs of the marriage. In 1704, he succeeds to a considerable estate. In 1705, he purchases land to the value of 10,000 merks. I hold that here 8300 merks bestowed in consequence of his obligation, and only 1700 merks conquest. According to the opposite hypothesis, Mr John Campbell could not fulfil the first obligation in his marriage-contract, by vesting the 8300 merks in land; for, as soon as he vested it, it became conquest, and fell under the second clause of his marriage-contract, providing the conquest to the heirs of the marriage. The consequence of this, after he succeeded to the estate of Ottar, was to oblige him to lay the burden of 8300 merks upon the estate of Ottar, contrary to the idea which he must have formed, when contracting, before his succession to that estate.

KAIMES. The conquest is provided in the same way as the 8300 merks to the heirs of the marriage; and yet no one will say that the heritable conquest goes to all the children of the marriage. I do not know any case where, in the same deed, the same words, without any interpretation by the granter, have been found to imply different series of heirs. If the adjudication of Tarbet's lands still subsists, it will be a debt against the eldest son; but the lands purchased will be his, the previous adjudication notwithstanding. Lands acquired by purchase must be considered as conquest: without this, the inquiry as to the extent of conquest would be inextricable. Still deduction must be made of debts left unpaid. Perhaps a man might exempt a purchased estate from under conquest, by declaring that it was purchased with a certain sum got by succession; but nothing of that kind occurs here, so that the ordinary rules of law must be followed.

JUSTICE-CLERK. The provision to heirs of the marriage will go to the eldest son; and yet the father, in such circumstances, might appropriate a part of it to his daughter, and declare that to be in implement *pro tanto*. But this is not the case here; for the daughter was not married till after the succession of Ottar opened to him; and there is no reference to the marriage-contract in the provision of tocher to the daughter. She was portioned as the daughter of the Laird of Ottar, not of Mr John Campbell the minister.

On the 13th June, the Lords "found that the pursuer, in virtue of his mother's contract of marriage, is entitled to the provision of 8300 merks, with interest from his father's death, to be paid out of the conquest of the marriage

in the first place ; or, if there is no conquest, out of the father's separate estate ; and that neither the 5000 merks of tocher paid to the pursuer's sister, nor the sums given to himself by his father, during his life, are to be computed in extinction thereof. Found that the pursuer is entitled to the lands of Barnentaig, &c., which were acquired by his father, during his first marriage, from M'Alister of Tarbet, and also to the lands of Daricnakeirichmore, acquired by him from Campbell of Kildalvan ; but found that he cannot take both the conquest lands and the special provisions, unless so far as there shall appear to be sufficiency of conquest to pay the special provision, over and above the lands ; and remitted to the Ordinary."

Act. J. Campbell, H. Dundas. *Alt.* R. M'Queen.

Reporter, Gardenston.

1770. July 20. THOMAS LOCKHART *against* ARCHIBALD SHIELLS.

ADJUDICATION—GROUNDS AND WARRANTS—IRRITANCY.

An Adjudication proceeding upon a special charge to enter to the Predecessor, who was not himself infest in the Subject, reduced and declared null and void.

Objections to a Decreet of Constitution.

The Irritancy in a Feu-contract, *ob non solum canonem*, not incurred *ipso jure*, and capable of being purged before declarator.

[*Faculty Collection*, V. 121 ; *Dictionary*, 7,244.]

MONBODDO. The objection that the adjudication proceeded upon a special charge, not upon a general special charge, ought to be repelled. A general special charge is a fiction of the writers, not of the law. Whether the predecessor was infest, or had only a personal right, it is all the same thing : if the heir is charged to enter heir in special, that is enough. It is argued that the irritancy could not be incurred without a declarator. I do not think that the irritancy was purgeable ; and, consequently, there was no occasion for a declarator. But it is to be observed that the feu-duties were demanded in the decret of constitution ; and this demand takes away any plea of irritancy.

COALSTON. Conventional irritancies are purgeable when penalties are exorbitant ; and here they are exorbitant from the rise of the rent of the ground. But he who asks equity, must give equity,—and therefore, as from equity, I allow the irritancy to be purged, so, from equity, I would sustain the adjudication as a security for the sums due, accumulated from the date of the decret.

HAILES. I think this adjudication is too rotten to be mended. The adjudging for the penalty, in the personal contract, and for the duplicand, on the entry of an heir, is too much to receive countenance in any Court.

KAIMES. Equity may interpose as to *pluris petitio*,—but this adjudication seems totally null and void. The predecessor was not infeft,—and yet a special charge is given, which is a contradiction.

AUCHINLECK. The adjudication is plainly null. A conventional nullity, *ob non solutum canonem*, is not purgeable; but still the superior must let the vassal know his resolution of taking benefit of the irritancy. Here a decret was taken for the feu-duties yet to run; nevertheless, the superior says, that the right of the vassal is irritated, which is a contradiction.

PITFOUR. There are many charters with severe penal irritancies, though, by convention, the Court has allowed them to be purged. No irritancy can be stronger than the legal statutory irritancies in tacks, and yet they may be purged. In tacks, the case is different; for, there, from the exact correspondence between the two parts of contract, the irritancy is supposed not penal. A rule which makes property precarious ought not to be followed. If the *nobile officium* is to be interposed in one way, it ought in the other.

ALEMORE. I should be sorry to enter upon a dry point of law. The words of an Act of Parliament are certainly as broad as the conventional irritancy; and yet it is certain that the words of the statute concerning tailyes, notwithstanding such irritancies, are purgeable.

PRESIDENT. Where there is a severe penal irritancy, there must be a declarator. This adjudication is liable to great exceptions. It is of little moment whether it be sustained to a certain extent or not, for there has been possession and intromissions.

On the 20th July 1770, “The Lords found the decret of adjudication void and null, and reduced accordingly; Repelled Archibald Shiells’s defences, that the feu-contract is void *ob non solutum canonem*, and found that he is liable to account for the rents of the lands contained in the feu-contract;” adhering to Lord Elliock’s interlocutor.

14th November, adhered.

Act. A. Lockhart. *Alt.* R. M’Queen.

Diss. Coalston and Barjarg, who thought adjudications good for bill, interest, and bygone duties.

1770. July 20. THOMAS FINDLAY *against* THOMAS MORGAN.

SERVICE OF HEIRS.

An infeftment taken upon a Precept of *Clare Constat*, to the next Heir of the person last seized in liferent, and to his Son in fee, erroneous; and an adjudication laid against the Son, as vested in the estate upon that title, reduced.

[*Faculty Collection*, V. p. 92; *Dictionary*, 14,480.] — *not*: 555

COALSTON. The interlocutor is agreeable to the feudal law, and to the noted case of *Landales*.

AUCHINLECK. My doubt is as to what has not been urged by the Lord Ordinary, that the infeftment, 1709, however erroneous, is now secured by prescription.

On the 20th July 1770, "The Lords found that the infeftment upon the precept 1709 was erroneous;" adhering to Lord Kaimes's interlocutor: but remitted to the Ordinary to hear parties as to prescription.

Act. R. M'Queen. *Alt*. A. Wight.

1770. July 24. ROBERT SCOTT of Logie *against* MRS MARGARET SCOTT.

PRESUMPTION—HUSBAND AND WIFE.

Donatio inter virum et uxorem, and implied revocation thereof by a posterior deed.

[*Fac. Coll.*, V. 95; *Dictionary*, 11,367.]

HAILES. The defender makes a merit of two things: *first*, That she induced her husband to settle his estate on the pursuer: this was a matter in which she had no business to meddle. *Secondly*, That she did not abstract the deeds in her husband's repositories: this was a matter wherein, if she had acted otherwise, she might have been set on the pillory. I do not see any delivery at all, or any proper donation. Logie amused himself in making deeds,—while undelivered, they were nothing. It would be dangerous to say, that, when a donation is executed by a husband to a wife, the husband's repositories are to be considered as the wife's repositories; for this would be to make a *donatio inter virum et uxorem* necessarily delivered whenever made.

AUCHINLECK. The defunct has been very uxorious. Some of the deeds executed by him were most irrational, particularly the liferent which he granted of the mansion-house. When he came to make a final settlement, he assigned the maills and duties to his disponee, and he reserved certain settlements in his

wife's favour. I cannot think that all the deeds in his repositories are to be considered as still subsisting.

PRESIDENT. The deed of settlement is the *ultima voluntas*. Logie may have made various destinations before, but that is the final result of all his destinations.

COALSTON. If the last settlement had kept in generals, without mentioning any particulars, there might have been difficulty; but here there is a special reservation of all that Logie meant to bestow on his wife.

On the 24th July 1770, "The Lords sustained the reasons of reduction."

Act. A. Lockhart. *Alt.* J. Scott. *Reporter*, Gardenston.

1770. July 24. JOHN THAINE *against* SIR WILLIAM MONCRIEFFE.

ADJUDICATION—MULTIPLEPOINDING.

Process of Adjudication cannot be stopped or delayed by a Multiplepoinding raised by the debtor, who was doubly distressed for the debt adjudged for.

[*Faculty Collection*, V. p. 99; *Dictionary*, App. I. *Adjudication*, No. 4.]

PITFOUR. This is a first adjudication: no damages can arise from delay,—How can the debtor have a penalty inflicted against him, while there is a multiplepoinding depending?

COALSTON. The debtor is doubly distressed: it is *in dubio* whether Thaine is preferable or not. The debtor is not *in mora*, and therefore why adjudge? The practice of the Court reserves objection *contra executionem*; but that will not apply to a first adjudication.

PRESIDENT. The *mora* is on the part of the debtor; for the creditor has done nothing to hinder his payment. Why should he be stopped from taking legal execution in order to secure payment.

PITFOUR. The distress arises from the pursuer; for he does not clear up his own preference.

GARDENSTON. If he who seeks adjudication is not a true creditor, he will have his labour for his pains; if he is, he will make his diligence good.

JUSTICE-CLERK. It is not difficult to rear up objections, and to bring a multiplepoinding. This will not stop the course of the law. If, in discussing the multiplepoinding, it be found that the creditor has adjudged for too much, he himself will be the loser.

AUCHINLECK. The bond is dated in 1765. It is hard to keep so much money dead. The interlocutor is right.

KAIMES. A suspension only stops personal diligence, not real. This may answer the decision 1707, *Tod*. How can a man have his estate adjudged,

when he is willing to pay, but is prevented by multiplepounding? *Answer,—* Let him consign. But, in this case, consignment is not offered.

On the 24th July 1770, "The Lords adjudged, reserving exceptions *contra executionem*;" adhering to Lord Hailes's interlocutor.

Act. J. Douglas. *Alt.* W. Nairne, A. Rolland.

Non liquet, Pitfour, Monboddo.

1770. July 26. MARGARET MORRISON, Relict of Alexander Macleod, and JOHN, DONALD, and OTHERS, their Children,—*Petitioners*.

JURISDICTION—TUTOR AND CURATOR.

A party having, by his settlement, appointed Tutors and Curators to his children, his wife being one, a petition was presented in her name, praying that she might be appointed *factor loco tutoris*, as the other tutors lived at a distance. But the Lords refused the petition, as it did not appear that the tutors had refused to act, and as, in case of their refusal, recourse might be had to the tutor of law, or to a tutor dative.

ALEXANDER Macleod died, leaving the petitioner, Margaret Morrison, his widow, and the other petitioners, his children, all minors. He left a deed, containing a nomination of certain persons as tutors and curators to his children, bearing, "any three of the said tutors and curators, who shall accept of the said office, to be a quorum, my said spouse being always *sine qua non*, in case she shall survive me."

The persons named as tutors along with the widow, lived in different parts of the country, and at inconvenient distances from each other. But, although none of them had accepted the office, it did not appear that any of them had formally declined it. In these circumstances a petition was given in, in name of the widow and children, praying the Court to appoint the petitioner, Margaret Morrison, to be *factor loco tutoris* for the other petitioners. On this petition the following opinions were delivered:—

HAILES. If this petition for a *factor loco tutoris* be granted, the Court must declare itself the guardian of all infants in Scotland. It is not said that the tutors named have refused to accept, nor that the tutor in law is unwilling to accept, nor that there is any difficulty of procuring a tutor dative: the mother, appointed a *tutrix sine qua non*, desires to be appointed *factor loco tutoris*. This would be going a great way, indeed, with the *nobile officium* of the Court.

COALSTON. The remedy sought for is only to be granted in cases of necessity. The Act of Sederunt, 1730, is founded on absolute necessity. Whether factors, named under that Act, ought to have advice from the Court, is another question, not before us here.

AUCHINLECK. It is not said that the tutors named have refused to accept. This woman wants to have the total management of the pupils' affairs.

JUSTICE-CLERK. The tutors named have not refused to act. The tutor of law may act. The widow may apply to the Exchequer for a tutory dative : so that this petition is, in all these three lights, incompetent.

COALSTON. Factors *loco tutoris* were established upon necessity ; but the necessity must be set furth. An Act of Sederunt is not to be overturned *per saltum*.

[This alludes to an apprehension which he had entertained, as if the Court meant to set aside the Act 1730 ; which was certainly a groundless apprehension.]

PRESIDENT. There is no intention to hurt the Act of Sederunt ; but only not to grant factories unless *causa cognita* and from necessity.

ALEMORE. Before the year 1730, there was no difficulty to find tutors : since that time, there is. If the country has lost humanity, it is owing to this Court being too apt to provide something in lieu of tutors.

AUCHINLECK. I like factors *loco tutoris*, for they serve for hire, and consequently better than those who serve for conscience sake.

On the 26th July 1770, " The Lords refused the petition."

For the petitioner, B. W. M'Leod.

1770. July 26. MESSRS PETER and BOGLE *against* DUNLOP'S TRUSTEES.

BANKRUPT—FOREIGN—ARRESTMENT.

The enactment of the statute 1696, c. 5, not effectual *extra territorium*. A trust-deed by a bankrupt, for behoof of his creditors, though reduced at home, as falling under the statute 1696, found to be effectual, and a valid title in favour of the trustees to apprehend the possession of the effects of the bankrupt situated in a foreign country ;—and, in a competition between the said trustees and certain non-acceding creditors to the trust, who had arrested the effects of the bankrupt sent home from a foreign country, both in the hands of the trustees and the master of the ship—the trustees preferred.

[*Faculty Collection*, V. 100 ; *App. I. Bankrupt*, No. 1.]

COALSTON. Judgment in the Courts of Virginia would or ought to have been given for the trustees. I think the same judgment ought to be given here. Had there been no bankruptcy the trustees would have been preferable : the only objection is from bankruptcy. A ground of challenge *de jure gentium* ought to be regarded every where—but a ground of challenge by statute of any country is local. The restraints in the statute 1696 are of the same nature as those by inhibition and interdiction. The statute of bankruptcy in England has no effect as to goods in Scotland—and so *vice versa*. The case of *Jackson* was de-

terminated at a time when the Court was in use of finding that the English statute extended to Scotland—and so *vice versa*.

MONRODPO. This is an ungracious plea on the part of the non-acceding creditors. The trustees have acted with proper diligence—the creditors sit with their hands across till the trustees convert the subjects into cash and bring it home. The creditors could not have made the subjects effectual in America—they could not have arrested there—their claim is as little supported by law as by equity. I do not say that a disposition by a bankrupt will tie up the hands of creditors. I agree to the judgment of the Court in the case of *Snee*. I should have thought arrestment good if laid on in any other hands than those of the trustees. My opinion would be the same were the effects such as had been collected in this country. The disposition to trustees is not void and null, either at common law or by the statutes 1621 and 1696. The decision in the House of Lords does not affect the general point—there seems no difficulty upon the other ground mentioned by Lord Coalston. With respect of the solemnities used in executing a deed, the law of the foreign country is the rule: With respect to the effects of a deed, they must depend upon the law of the country where the execution is sued.

AUCHINLECK. It is not necessary to enter upon the general point: that was determined in the case of *The Creditors of Duke of Leuths*. If this case were to be tried in the plantations, it would be regulated by the law of the country. A debtor's effects are liable to his creditors wherever they are attached. If Dunlop had sent over effects from America, the creditors might have attached them. They are sent to trustees. The law says that the trust-right is ineffectual. How then can the trustees hold them by an ineffectual right?

PITFOUR. I suppose trust-rights to be ineffectual. My opinion is founded upon the nature of jurisdiction, and all the laws throughout Europe concerning bankrupts. Statutory frauds,—if we may call them so,—cannot have effect beyond their meaning: no statutes can go beyond *territorium statuentis*. We cannot now go into the notion that *mobilia non habent sequelam*. That doctrine is exploded. The English bankrupt statutes have no effect as to the estates of an Englishman in Virginia. Virginia was settled in 1620. It is liable to the laws of England as they then stood, but no farther, unless there is a special provision to that effect. Thus, by Act 29th Ch. II., three witnesses are required to a testament, but only two are required in America—because the colonies were settled before the 29th of Ch. II. It is said that it is strange that a deed null by both laws,—by that of England as to its form, by that of Scotland as to its substance,—should be able to carry off the effects. I answer,—the deed is not null by the laws of Virginia: for laws regulating the solemnities of deeds are good all over the world. This is not a matter of *comitas*, but of necessity—neither is this deed reprobated by the law of Scotland. It is only limited *qualificate*, as to goods in Scotland. As to what is said, That the trust-right is ineffectual, and how can you make it effectual by receiving the effects abroad? I answer,—the creditors have as good a title to the effects by the law of the foreign country as if they had purchased them: you can only seize the bankrupt's effects, not those of his creditors, where the acquisition is lawful. The

argument, if good, here, would never serve any other person ; for the trustees would always divide upon the spot, instead of bringing home the goods.

KAIMES. I have no doubt that the trustees would have been preferred in Virginia. The goods of Dunlop were brought home to this country : How can this make any difference ? I do not see how the creditors-arresters can be preferred. I am for a *pari passu* preference.

JUSTICE-CLERK. All that the trustees did was by a right, good every where from necessity, not *ex comitate*. The Bankrupt Act, 1696, operates upon effects in Scotland. The trustees, had they touched such effects, would have been holding a subject contrary to the law of this country. But here the case is different : they hold the goods by a title valid in the law of Virginia. It makes no difference whether the trustees had divided the proceeds in Virginia, or brought them home.

ALEMORE. This is a very favourable case. But, suppose that a bankrupt should seek to prefer any single creditor, might he not do it in this shape ?

GARDENSTON. The present case depends upon the local situation of the goods. If there was a valid right to them in Virginia, how could it cease upon the goods coming to Scotland ? How shall property play bo-peep in this manner ? I do not apprehend any danger from partial preferences. Fraud will not stand anywhere : It is reprobated by the laws of every country.

PRESIDENT. This presumption of fraud being unavailable, will not do. In many cases there may be no fraud other than the statutory fraud by Act 1696. The deed of trust is a good title to recover ; but, when the effects are brought to Scotland, then the law of Scotland must take place.

On the 26th July 1770, the Lords preferred the trustees.

Act. R. Blair. Alt. H. Dundas.

Hearing in presence, after report, by Auchinleck.

Diss.—Auchinleck, President. *Non liquet*,—Kennet, Strichen. Kaimes for a *pari passu* preference.

1770. August 2. WILLIAM ROBERTSON *against* JANET ROBERTSON.

PREScription.

An adjudication being led against two distinct subjects, but no infestment taken ; so that it remained a personal right, and possession maintained only upon one,—the right to the other found to be cut off by the Negative Prescription.

[*Faculty Collection*, V. p. 105 ; *Dictionary*, 10,694.]

MONBODDO. The only argument for the pursuer is from the decision in 1671, *Balmerino*. I think that decision erroneous, and that the Court did not make a proper distinction between the debt and the *jus hypothecæ*.

COALSTON. I doubt as to all the points. Do not think that the negative prescription has run. In a question with the debtor, possession as to part, by adjudication, will interrupt as to the whole. There is no pretence for the positive prescription: the possession of the author, before the date of the disponee's right, can never come *in computo*.

PITFOUR. I have ill-will to quit with the decision of *Balmerino*, because of old acquaintance. I do not regard the authority of a decision of yesterday, further than as I am led to it by my respect to the judges who pronounce it. But an old decision is of more weight: it has the acquiescence of the nation, otherwise there would be nothing but a *jus vagum et incertum*. The case of *Balmerino* does not apply. Here I go upon the negative prescription. A disposition, irredeemable, without infeftment, cannot save from the negative prescription. In a right of property there is no unity, as in a right of annual-rent.

KAIMES. I have no idea that old Thomas's possession can come *in computo*. So, positive prescription is out of the question.

AUCHINLECK. It is extraordinary that this pursuer, who has lain by for 40 years, should be allowed to come in upon the adjudication, and take a second crop of it. Possession of one part upon a right of security will save as to the whole. But here there is a right of property, if it is any thing. Here one tenement kept. The reserver did not object; which he might have done had possession been taken of both tenements. When one does not follow out his right, the reverser is safe. An adjudger has only a personal right till infeftment is expedite: here no infeftment even at this date. There is nothing to hinder the other party from taking infeftment.

MONBODDO. I considered the decision of *Balmerino* as a single decision. It would be extraordinary if the creditor, by possessing one part, should, at the distance of forty years, or even of an hundred years, have recourse upon the rest. Take the adjudication as you will, prescription is run. If an adjudication is a right of property, the negative prescription will not apply, but the positive will. Thomas Robertson was in the course of acquiring by the positive prescription. The disponee from him may plead the prescription begun in his person. Upon the supposal that the adjudication is a right in security, the negative prescription will take place. The *mora* ought also to be considered.

PRESIDENT. I would be sorry to shake any principle already established. An adjudication may, in its consequences be a right in security, but in its nature it is a sale. Suppose two dispositions:—no infeftment on the one—neither possession nor infeftment on the other; I consider this last as derelinqished after forty years. I doubt as to positive prescription, when Thomas Robertson's possession is pleaded, for he is the common author. I doubt also as to the *mora*.

On the 2d August 1770, "the Lords assoilyied the defender;" adhering to Lord Stonefield's interlocutor.

Act. R. Blair. Alt. J. M'Claurin.

Diss. Coalston. No vote.

1770. *August 2.* DAVID GLEN *against* THOMAS YOUNG.

WRIT.

The deposition of an instrumentary witness, who deponed *non memini* as to his knowing the granter, and having seen her subscribe, not sufficient, in terms of the statute 1681, c. 5. to void the deed.

[*Faculty Collection*, V. 109; *Dictionary*, 16,905.]

COALSTON. There is a difficulty from the terms of the Act of Parliament. If witnesses to a recent deed were positive as to this fact, That they did not see the party subscribe,—the deed would be null: but, after some years, it would be dangerous to interpret the Act so strictly. The law requires knowledge—nevertheless in practice the witnesses do not know the party.

MONBODDO. The law is express: decisions on the law are strong: How can we depart from the law and the decisions?

HAILES. This is too strict: the one witness remembers every thing,—the other does not remember—but he says nothing which leads to the belief that he did not see the party subscribe. When he says that he does not know the party—he explains himself so as to show that, by knowledge, he meant personal acquaintance.

AUCHINLECK. Were there a recent challenge, the strict words of the statute might have some efficacy; but here the challenge is after several years.

PITFOUR. To yield to this objection would be to accuse our nature, which cannot long retain the memory of uninteresting facts.

On the 2d August 1770, the Lords assoilyied; adhering to Lord Auchinleck's interlocutor.

Act. A. Crosbie. *All.* J. M'Claurin.

1770. *August 3.* DAVID OGILVIE *against* ROBERT GRUAR.

TACK—SERVICES PERSONAL.

A Tenant found not liable for certain perquisites or fees to the ground-officer of the Barony, they not being mentioned in the Tack; although it appeared that, by the immemorial usage of the Barony, the Tenants had been in use to pay such fees.

A FARM on the estate of Dunsinnan being let by public roup, the defender, as the highest bidder, became tenant thereof. By the written tack entered into

between him and the landlord, he became bound to pay a certain rent to him, &c. Some time after the defender's entering, a demand was made upon him by the pursuer, the ground-officer of the barony, for payment of certain small perquisites or fees, which, although not mentioned in the tack, had been in use, it was alleged, for time immemorial, to be paid by the tenants on the estate. The defender having resisted this demand, an action was raised for the amount. And, after a proof of the custom, the Lord Ordinary pronounced this interlocutor: "Finds it proved that it has been the immemorial practice of the barony of Dunsinnan for the tenants to pay certain fees to the baron-officer, though not specified in these tacks: Finds, that the fees in use to be paid out of the defender's possession, was a firloft of oats, and a peck of meal yearly; and, therefore, finds the defender liable in payment of the said dues," &c.

In a petition against this interlocutor, the defender, besides maintaining that the alleged custom of the barony could not be binding on him, who was a stranger, and took the lands at a public roup; also founded on the Act of the 20th Geo. II. prohibiting indefinite services of tenants.

The following opinions were delivered:—

ALEMORE. The Act 20th Geo. II. is salutary. I would not depart from it even in trifles.

COALSTON. The tack is the rule between master and tenant. It is dangerous to introduce any prestation not in the tack.

AUCHINLECK. When a proprietor sets his lands, he ought to speak up all that is to be paid. Prestations not depending upon the master will be implied though not expressed. A fee to a baron-officer is not of that nature.

GARDENSTON. This question, mean itself, is great in its consequences. By the statute 20th Geo. II. a tenant is liable for nothing but what is in his tack. The baron-officer is the servant of the master: why should the tenant pay him?

PRESIDENT. A stranger to the barony takes his tack by public roup upon conditions. Prestations to the baron-officer are none of them. After the tack is granted, the baron-officer comes and claims fees. It is of great moment to hold fast by the statute.

On the 3d August 1770, "The Lords assoilyied;" altering Lord Barjarg's interlocutor.

Act. W. Nairne. Alt. Ch. Boswell.

1770. August 10. PRESBYTERY OF PAISLEY *against* DAVID ERSKINE.

PATRONAGE.

Jus Devolutum.

[*Dictionary*, 9966.]

JUSTICE-CLERK. I am for adhering, because this very matter was formerly agitated in the ecclesiastical court; and the presbytery itself, though now insisting on a *jus devolutum*, admitted the presentation to be regular. This admission cannot be retracted by means of the appeal to the synod.

HAILES. Most of the new objections made by the presbytery were made and repelled, in the case, *February* 1749, *Hay of Lawfield* against the *Presbytery of Dunse*. The statute, 1719, is abundantly strict; yet it contains no limitation or prescription. Now, it is certain that probationers do not the oaths upon obtaining a license to preach. It follows that his Majesty's advocate may imprison the whole presbytery of Paisley, and indeed the whole clergy of Scotland, for six months, upon the presbytery's own argument; and nothing can relieve them but an indemnity: so little do the pursuers advert to the ground on which they stand.

PITFOUR. The objection is founded on a misapprehension of the statute 1719,—“or before admitted ministers.” This is a plain alternative, “terms above provided:” that is, in the terms of the alternative in the former clause. [This is a benevolent interpretation; but the words of the statute will not carry it through.]

COALSTON. The whole strain of the presbytery's argument is, to lay hold of detached words, neglecting the spirit of the law. Lord Blantyre is not a non-juror, in terms of law. He is abroad, and cannot have an opportunity of qualifying. The law has not said that a patron, who does not qualify, shall not have the power of disposing. As to the other points, of the opinion already given.

AUCHINLECK. My doubt is as to the first point. A patron forfeits his right if he refuses or neglects to qualify. Can he go beyond seas, and present under this pretext, that he has no opportunity of qualifying beyond seas?

PRESIDENT. The meaning of the law is, that the patron must take the oaths. It was rash on the part of Lord Blantyre to give in a presentation when there was a disposition granted to Mr Erskine. However, it was withdrawn within the six months, and a regular presentation offered in its room. This will do.

KAIMES. Lord Blantyre is out of the kingdom. Had no access to take the oaths. We cannot forfeit him.

On the 10th August 1770, “The Lords adhered and assoilyied.”

Act. A. Crosbie. *Alt.* D. Rae.

Reporter, Monboddo.

N.B. In this case Mr Crosbie objected that the presentation was not offered on the Sunday, though he had formerly argued on that supposition. But upon declining a proof, [from the dread of being found liable in past expenses, and perhaps future,] the Lords proceeded to advise the cause.

1770. November 14. MARY JAMIESON *against* ISOBELLA HOUSTON.

ALIMENT—HUSBAND AND WIFE.

The rents of a small subject, the property of a wife separated from her husband, found to be an alimentary provision to the wife, and not attachable by the husband's creditors.

[*Fac. Coll.*, V. 128 ; *Dictionary*, 5898.]

GARDENSTON. I do not know any law which gives a wife preference to her husband's creditors, even for aliment. The nature of marriage is, that parties go together, for better for worse. If a woman makes a rash choice, she must suffer the consequences.

KAIMES. If a man turns low in his circumstances while he resides with his wife, she must suffer with him ; but here he deserts her,—L.13 is all her sustenance. When the husband deserts, a claim for aliment arises ; may not the wife, in such circumstances, retain ?

COALSTON. A husband has a right of liferent, and a right of administration ; and while he lives with his wife, the wife has no preferable right for aliment, even out of subjects originally her own. But here there was a separation : if by the fault of the husband, the wife may compete with creditors ; if by her own fault, she may not.

MONBODDO. I agree with Lord Coalston upon the general principles ; but would prefer the wife upon the specialties of the case, which imply a tacit agreement that the wife should be alimented out of her own funds.

KENNET. The husband resided in Scotland, and yet did not cohabit with his wife : this implies desertion.

PITFOUR. The wife was in possession of L.13 *per annum*. This was a small aliment which liquidates itself. There may be some difficulty in strict law ; but there is evidence, *robis ipsis et factis*, that the husband deserted his wife, and that she should be alimented out of her little subject.

HAILES. I doubt as to this : for it seems to take for granted just what ought to be proved. There is no presumption in the law, that a husband will desert his wife maliciously ; and, therefore, it seems necessary that the cause of the separation be first of all inquired into.

ALEMORE. I see no preference that a wife has upon any particular subject falling under the *jus mariti*. In the circumstances in which she stood, she

might uplift ; but, when she is interpellated, how can her husband or his creditors be excluded ?

PRESIDENT. The specialties, in this case, are excessively strong in favour of the wife. A tacit consent may be as valid as if there had been an actual allotment of the wife's rent by way of aliment.

On the 24th July 1770, " The Lords, in respect that it is not alleged, on the part of Mary Jamieson, that Captain Houston cohabited with his wife or alimented her, preferred Isobella Houston to the sum *in medio* ;" adhering to Lord Kaimes's interlocutor.

On the 14th November 1770, adhered.

Act. Alex. Belches. Alt. W. Baillie.

Diss. Alemore, Gardenston, Coalston, Hailes. *Non liquet*, Elliock.

[The reason of my differing from the judgment was, that I wished for more light into the fact ; and, as some insinuations had been thrown out against Mrs Houstoun's character, I thought there was a propriety in inquiring by whose fault the separation happened.]

1770. November 17. JEAN JOHNSTONE against HUNTER JAMES FERRIER.

MINOR.

A male, under the years of pupillarity, incapable of contracting a marriage.
Effect of Lihibition after the years of pupillarity are expired.

[*Faculty Collection*, V. 130 ; *Dictionary*, 8991.]

AUCHINLECK. The maxim *malitia supplet aetatem* is an old maxim : But where is the *malitia* here ? There is a great deal of *stultitia* if you please. This woman gave the child money to buy sweeties, I suppose : she gets herself joined to him in the form of wedlock by a *Buckle-the-Beggars*, and the child returns to the country with a wife and his sweeties. Where was the *malitia* then ? Had there been any, he would have consummated directly. Instead of this, the first time he appears in the character of a husband, is lying in the same bed with Jean Johnstone, his clothes on, and his face turned to her back. Had there been any *malitia* in him, Jean would not have been in that posture : had Nash the dragoon been in bed with her, she would not have turned her back upon his *malitia*.

GARDENSTON. A marriage with Nash may be presumed : there is better evidence of that. In the course of the proof, we have much of low life and low love. Jean is a very fit wife for the dragoon : she has two husbands, one of them indeed a boy, and I suppose that he has had two or three wives since he parted with Jean. The maxim *malitia supplet aetatem*, is adopted by Lord

Bankton. I respect that authority ; but I would require much more than that authority to persuade me, that the unripe vigour of a young lad is to supply the place of years and understanding.

JUSTICE-CLERK. The maxim cannot apply to our law. It is dangerous to suppose that the form of marriage, celebrated under the years of puberty, may become good after the years of puberty, unless there be a solemn consent and cohabitation of parties : Nothing of this kind occurs here.

ELLIOCK. A solemn consent and cohabitation would do ; for that is sufficient to constitute a marriage *ab initio*.

On the 17th November 1770, " The Lords remitted to the Commissaries, *simpliciter* ;" [who had found no marriage.]

Act. Andw. Balfour. *Alt.* G. Clerk. *Reporter*, Stonefield.

1770. November 21. JOHN and WILLIAM CUNNINGHAMES *against* ROBERT HAMILTON of Wishaw.

PERSONAL AND TRANSMISSIBLE.

A Tack for 57 years, secluding assignees and sub-tenants, not Adjudgeable.

[*Fac. Coll.*, V. 136 ; *Dictionary*, 10,410.]

MONBODDO. Lord Elchies was against the first judgment in *Elliot's* case, but he altered his opinion upon a second hearing, and the judgment became unanimous. I doubt as to the decision upon Corthen's bond, *ex facie*. Wishaw was as much debtor as M'Gregor ; and I think M'Gregor's declaration, taking the whole debt upon himself, is reducible upon the Act 1621.

PITFOUR. I should not incline to give my vote for altering the decision, *Elliot*. It is single indeed, but it has been acquiesced in by all men of business for a long tract of years : an alteration would make the law vacillant and uncertain, though the consequence of the decision is to establish a subject in the debtor which creditors cannot reach. [They can reach the annual produce of the lease.] I do not, however, think that the decision, *Elliot*, exactly applies to this case. Here there is no absolute exclusion of assignees ;—so adjudgers are not absolutely excluded. Wishaw himself has adjudged : may not others adjudge in imitation of him ; and, if they are within year and day of him, how can he refuse to admit them as to Corthen's bond ? In the case of *Sir William Nairn*, 1725, the Court found that the declaration of a bankrupt did not prove. It has since been found, that the oath of the bankrupt is good against the arrestee.

KAIMES. Although I was lawyer on the losing side of the case of *Elliot*, and was abundantly keen ; yet, afterwards, when I cooled, I thought the

judgment right. The adjudication deduced by the master does not vary the case. The master might have been assignee; and why may not the adjudger? His departing from his privilege, in so far, will not imply that he consented to admit every adjudger. It is pretty arbitrary, whether we believe the bankrupt or not, as to Corthen's bond. Had his testimony been given to the prejudice of the person in whose favour the partial disposition *omnium bonorum* was granted, I should have given more credit to him.

KENNET. The exclusion of assignees is a reasonable stipulation. If, in such case, the tack could be adjudged, the stipulation would be constantly eluded. It is impossible to exclude *heirs*, because, without a clause to heirs, it would be difficult to find tenants. Adjudgers, who now generally come in *pari passu*, ruin both the land and the master. The adjudication deduced by the master is nothing; for at that time he imagined there was a new bargain with M'Gregor. Besides, the master, by adjudging, returns to his own right. If the subject was not adjudgeable, how can posterior adjudgers come in? As to Corthen's debt, the declaration and disposition were long before M'Gregor became notour bankrupt.

ALEMORE. I never heard the decision, *Elliot*, contradicted by men of business. The argument (by Lord Pitfour,) for Wishaw's giving up his privilege, rather pleased than convinced me. The adjudication contains an express protest, that it should not infer a consent to assign. If Wishaw has passed from his adjudication, the other adjudgers must come in upon their own diligence. Now, that diligence is ineffectual, according to the decision, *Elliot*. As to Corthen's debt, if the creditors say the acknowledgment is false, they must prove it.

HAILES. As to Corthen's debt, you have an express declaration of M'Gregor, importing what is probable; for it is improbable that Corthen, a stranger, would have lent L.500 to M'Gregor,—but very probable that he would have lent a thousand pounds to Wishaw. The creditors, at this moment, do not say that M'Gregor's acknowledgment is improbable, or that the contrary supposition is probable.

PRESIDENT. As to the case of *Elliot*, Elchies was brought over by this argument. That, as the law stood in the last century, when masters were liable for many delicts of their tenants, it was of consequence for masters to exclude assignees.

COALSTON. As to Corthen's debt,—It is not sufficient, to cut down the evidence of a fact, that the person acknowledging is a bankrupt.

On the 21st November 1770, "The Lords found that the seclusion in the tack is effectual against legal assignees, by adjudication, and that the creditors of M'Gregor, the tenant, by their adjudication of the tack of Easter Park and Birkenhill, can take nothing, and have no title to compete with Mr Hamilton the proprietor: found the adjudication on the debt due to Corthen is effectual;" adhering to Lord Auchinleck's interlocutor: but "Found that the adjudication of the lands, concerning which there was a power of subsetting not exercised, is null;" altering Lord Auchinleck's interlocutor.

Act. A. Lockhart. *Alt.* R. M'Queen.

Diss. As to Corthen's debt,—Kaimes, Monboddo. *Non liquet*,—Gardenston.

1770. November 28. ELIZABETH and ISOBELL CAMPBELLS *against* GABRIEL CAMPBELL.

SUCCESSION.

The Heirs of the Disponee, though he predeceased the Disponer, preferred in the succession to the Disponer's other nearest Heir.

[*Faculty Collection*, V. 147 ; *Dictionary*, 14,949.]

ALEMORE. A disposition to a man and his heirs will not be evacuated by the predecease of the man.

KAIMES. We must suppose that the disponee has a right, but still defeasible during the disponer's life.

PITFOUR. A deed is no less a deed *inter vivos* because I keep it in my pocket. The right is vested in one *ignorans et non sciens*.

PRESIDENT. We would shake the security of many land rights, were we to alter the judgment of the Ordinary.

HAILES. This is a foolish, vain deed ; but there is no law prohibiting foolish, vain deeds.

On the 28th November 1770, the Lords "preferred the heir-male ;" adhering to Lord Monboddo's interlocutor.

Act. A. Elphinstone. *Alt.* D. Rae.

1770. December 5. MRS MARGARET PORTERFIELD *against* HOUSTON STEWART NICOLSON of Carnock.

WITNESS.

The Adulterer is a competent witness upon the part of the Pursuer in an action of Divorce. A Negro Slave, not a Christian, may be received as a witness. Objection of Relationship, *proditii testimonio*, and agency.

[*Faculty Collection*, V. 158 ; *Dictionary*, 16,770.]

[As this question is curious and interesting, and as I took considerable pains in making a distinct report, I shall transcribe it at large from my notes.]

MR Stewart Nicolson of Carnock insists in an action of divorce, for adultery, against his wife, Mrs Margaret Porterfield.

It was found, *first*, by the Consistorial Court, and afterwards by your Lordships, that the pursuer was obliged to specify the person with whom he charges his wife as guilty. Your Lordships know that this judgment was pronounced, because it appeared that the pursuer knew the supposed paramour. Such being the situation of the cause, the pursuer fixed upon one William Graham as the paramour; and he specially restricted his charge to the crime of adultery, committed with William Graham. This Graham was the son of a tenant of Sir William Maxwell of Springkell, who is married to the pursuer's sister. Graham was originally a stable-boy at Springkell,—afterwards a footman,—next a servant attending on Sir William's person,—and, at last, a sort of clerk or overseer to Sir William.

In the course of this action of divorce, the pursuer, among other witnesses, sought to produce Sir William Maxwell, one Latchemo, a negro, said to be the slave of Sir William, and William Graham. Objections were moved against their examination.

The Commissaries, upon considering the memorials, &c. of parties, and the proof already brought, “allowed Sir William Maxwell to be examined *cum nota*: Found the objections stated against the evidence of William Graham not competent at the defender's instance; and therefore repelled the said objections, and allowed the witnesses to be adduced; reserving to him, in case he thinks fit, to object to his own examination, or to the interrogatories to be put to him; and to the Court to judge of the import of his objections, if any such are offered, as accords. As to Latchemo, the negro; before answer, appoint him to appear in Court in order to be examined upon the articles of his faith.”

To this interlocutor they afterwards adhered, with this explanation, “that they reserved to themselves to judge what degree of credibility shall be given to the evidence of William Graham, in the event of his being examined as a witness in the cause.”

Mrs Nicolson, the defender, has offered a bill of advocacy. I am to report the bill, answers, and replies. The objection to the testimony of Sir William Maxwell is threefold:—*first, relation*,—*second, interest*,—*third, his conduct* in the preliminaries of this cause: and the defender requests that these objections, though severally stated, may be taken in one complex view.

First, Relation,—“Sir William Maxwell is married to the pursuer's sister, and therefore cannot be received as a witness for the pursuer.”

In support of this objection, various authorities, well known to your Lordships, are quoted, and, in particular, *secunda statuta, Rob. I., c. 34*.

As to *secunda statuta, Rob. I.*, the pursuer answers, that the statute, c. 34, is obsolete. [He ought rather to have answered that there is no such statute; and, indeed, Skene, when he published what he called *secunda statuta, Rob. I.*, was conscious that they were of no authority. Unluckily, Lord Bankton has quoted them; and if the Latin copy is not studied, and if the origins of our law are neglected, it is possible that *secunda statuta Rob. I.* may, in some after age, be held to have been the law of Scotland.] Upon the whole, however, the pursuer seems to acknowledge the rule that such witness is not regularly admissible. Both parties agree that there are exceptions from the rule. The question, then, is, Whether the exception occurs here? The pursuer argues that, in atrocious

and occult crimes, the law relaxes the strictness of its rules ;—as in adultery, a crime most atrocious and most occult. In support of this, he quotes various authorities ; and particularly, with respect to occult offences, he quotes three precedents as analogous to the present case. In *Mrs Cumming's* case, her children were received as witnesses for proving her husband's maltreatment of her, 1748. Miss Cathcart was received as a witness for Lady Houston, her sister, in an action of separation and aliment. Mrs Malcolm was received as a witness for her daughter, Miss Malcolm, in a declarator of freedom from marriage. The defender answers,—from the atrocious nature of the crime of adultery, the pursuer cannot plead that witnesses, regularly inhabile, ought to be admitted ; for this is, in effect, to plead that, the greater a crime is, by the more exceptionable evidence may it be proved. And, as to adultery being an occult crime, that is inconsistent with the pursuer's own hypothesis, for that he describes the defender as foolishly enamoured,—as openly flagitious,—as infatuated in guilt ; and, for making good this horrid description, he has produced a list of twenty witnesses. He therefore cannot be admitted to argue from the occult nature of the crime in general. Further ; because adultery is an occult crime, it does not follow that the nearest relatives of either of the parties are necessary witnesses, and therefore admissible. On the contrary, unlawful intrigues are most carefully concealed from the observation of the nearest relations. Nor has the pursuer specified in what manner Sir William Maxwell became apprised of any particulars of the defender's conduct, or why he is to be considered as a necessary witness. The precedents of *Cumming*, *Houston*, and *Malcolm*, are not in point. In the case of *Cumming*, it appeared that the defender had dismissed his servants, so that his conduct in his own house could be proved by his children alone ; and therefore they were necessary witnesses. Besides, it was not pretended that the children had any interest in the cause ; whereas, it will be shown hereafter that Sir William Maxwell has an interest in this cause. For the case of *Lady Houston*, the facts to be proved by Miss Cathcart happened in foreign countries, and in such circumstances that none but those in family with the parties could know any thing concerning them. In the case of *Miss Malcolm*, there was an extreme penury of witnesses, incontestibly proved.

Second, The defender next pleads that Sir William Maxwell is not admissible, by reason of his interest in the event of this cause. This interest she specifies in two particulars : *first*, it appears that the pursuer's father has expressed his intention of excluding from his succession the second son of the parties as spurious. This intention was only upon the supposition of the defender's guilt. It places the wife of the witness in a degree nearer to the destined succession of her father. Her father has three sons indeed, but two of them are unmarried, and the eldest son of the other is an infant ; so that the hope of succession is not remote.

Secondly, Lady Maxwell, the wife of the witness, on the 4th of November 1769, wrote a letter to the father of the defender, wherein she says, " When you believe your daughter innocent, you must of course believe me guilty. And in defending her, [*i. e.* in the course of her defence,] I well know I must suffer. I confess it is natural for you to defend her ; I expected it. I have foretold it ; but you must allow it is equally so for me to vindicate myself. Therefore, since

matters are come so far, I frankly own that I shall not be easy till I have attested most solemnly by oath what I have already declared upon this subject." From the strain of this letter, the defender concludes that Lady Maxwell makes her own character depend upon the ruin of the defender's, and that she has expressed a sort of impatience to be admitted to make oath against her unhappy sister-in-law. Hence it is argued, that the ruin of the defender is determined at Springkell, in order to preserve the character of Lady Maxwell for candour and veracity ; and that, if there is such a thing as female insinuation, Sir William Maxwell cannot give impartial evidence.

To the objection of interest, the pursuer answers ; *first*, That the intention of Sir Michael Stewart creates no interest in the succession to his estate in favour of his daughter, or her husband. If it did, the interest is contingent and consequential, which the law regardeth not. Besides, the interest, were there any, would lie the other way. If a divorce follow, the pursuer might marry again and have issue. If not, enough has been already proved for preventing his cohabiting with the defender. As to the *second* objection, a long and laboured apology is offered for the conduct of Lady Maxwell : but, be her conduct what it will, that is no legal objection to the evidence of her husband.

Third. It is said that Sir William Maxwell is an inhabile witness for the pursuer, in respect that he was present when some of the witnesses made extrajudicial declarations.

This objection seems to have been overlooked by the pursuer. The probable answer seems to be, that Sir William Maxwell did no more than what every master of a family in his circumstances is authorised to do. And, as it is not said that he either intimidated or cajoled the witnesses, the objection is of no weight.

As to Latchemo the negro, it is objected, *first*, that he is not baptized, and, consequently, no Christian : And that, by the forms of the Consistorial Court, the oath administered is peculiar to Christians, and can be taken by none else. *Secondly*, That he is the slave of Sir William Maxwell, a party concerned, depending on him for the British air which he breathes, incapable of acquiring property, and not worth the king's unlay.

As to the first objection, that " Latchemo is not baptized, and, consequently, not a Christian, nor capable of making oath in the Consistorial Court ;"—the argument seems imperfectly treated by the counsel. Indeed, it appears to be premature ; for that the commissaries have hitherto determined nothing as to his admissibility.

As to the second objection : the pursuer answers, that Sir William Maxwell is an habile witness, and, consequently, no objection of inhability can lie against a person merely because connected with him. Besides, there are no slaves among us, in the Roman sense of the word. Latchemo is indeed bound to perform service for life, but he is capable of acquiring property. His master, were he to beat him, would be liable to an action of battery. Were he to murder him, he would suffer no less punishment than if he were to murder the first peer of Great Britain. And as to his not being worth the king's unlay, the objection is obsolete and exploded. It might go to his credibility, but cannot to his admissibility. The objection as to William Graham seems the question of most

moment. It is fit to premise, that your Lordships are not called to judge whether, supposing Graham to be received as a witness, he can, in law, be compelled to answer; nor whether he ought in conscience to answer: neither are you called to judge of the credibility of his testimony. The only question determined by the commissaries, and brought under your review, is, whether he can be received as a witness for the pursuer? I need not enlarge on the first objection,—that he is the menial servant of Sir William Maxwell. For that, independent of every other answer, *this* is sufficient,—that he is not the menial servant of Sir William Maxwell. The next objection is more natural. It is said that the proof is already restricted to guilt with Graham; and, therefore, no question can be put as to guilt with any one else. So standing the case, the pursuer must either admit that he cites Graham to no purpose, which would be calumnious; or that he cites him to prove his own guilt by his own testimony, which is contrary to the rules of law.” Here the defender lays down the argument as to the inhability of a *socius criminis* to bear witness. They are the same arguments, and supported by the same authorities, which your Lordships, either while at the bar, or sitting in another Court, have had full occasion to canvas. I will be permitted, therefore, to refer to them as fully stated in the printed papers. The defender enforces her argument by the case of *Carruthers of Dormont*, in 1742, where the husband fixed on one Bell, a servant in the family, as the guilty person. The wife offered to produce Bell as a witness, for discrediting other witnesses, and also to give evidence with regard to the alleged guilt. The judgment of the Court of Session was this—“Remit with an instruction to allow the defender a proof of the hails articles of the additional condescendence, except the article with regard to Bell’s oath; and with this instruction, that Bell be not admitted a witness, either for or against the defender, as to the facts charged against him by the other witnesses.” Here indeed the question was, as to admitting him for the defender; but the judgment of the Court went farther, and found, as if *ex officio*, that he could not be admitted either for or against the defender. This is a judgment in point, and there is no later judgment to the contrary. The pursuer answers that the objection of *socius criminis* may be good where the witness can have an opportunity of clearing himself by loading the person accused; but that this cannot take place here. Were Graham to swear against the defender, he could not, as the case is circumstanced, clear himself. The pursuer farther quotes, as a precedent in point, *Campbell of Ederline*, 1726, where Janet M’Lean and Helen Moodie, two prostitutes, with whom *Ederline* was charged as guilty, were examined by authority of this Court. The pursuer answers, to the case of *Carruthers*, 1742, that the interlocutor concerning *Bell* was not pronounced by the Court, but by a single Ordinary [Lord Drummore] in time of vacation;—so that can be no precedent. The pursuer admits that a *socius criminis* is not a witness *omni exceptione major*; for that it detracts from the credibility of a witness that he is supposed guilty of a crime. Consequently he admits, that, if there were no evidence of the guilt of the defender but what might arise from the testimony of her supposed paramour, a strong objection would lie against him. But he contends that the case here is very different. From the examination of many unsuspected witnesses, there is already a *semi-*

plena probatio, and Graham is produced to confirm and connect their testimonies, not to establish guilt by his single evidence. What the pursuer demands is agreeable to the forms established in the neighbouring kingdom: He has produced the opinion of English civilians, confirmed by various precedents. The opinion of Dr Compton begins thus: "I am clearly of opinion that it is the established practice of the ecclesiastical court in England to allow the libellant to adduce the *particeps criminis* as a witness, whenever he is willing to be examined, to prove the fact of adultery." And Dr Harris says, "that question is now at rest." The defender replies, That the Court varied in the case of *Ederline*; for the first judgment was against the examination of the two prostitutes, and that the case was not fully or properly argued: That it was unjust in the commissaries to rest any part of their judgment on the proof already brought by the pursuer, for that the defender has had no opportunity of bringing her reprobatory and exculpatory proof: That she cannot in prudence point out at present what she will hereafter prove. This would be giving her party an advantage too obvious in the conduct of the remainder of his proof.

She can only say that there are some trifling and inconclusive circumstances sworn against her, whereof she has no remembrance. As to the rest, they are incredible and false; and the witnesses, in speaking as they have done, speak from strange prejudices, or from some worse cause: That authorities from England are of no consequence; for that the practice of the two nations is different. Thus, in England, ultroneous witnesses are received; but it would be strange to argue, from thence, that they ought also to be received with us.

The *third* objection, for the defender, is, "that Graham, according to the pursuer's own hypothesis, is infamous and intestable. The 11th law of William the Lion says, *Infamas dicimus omnes illas personas esse, quæ, pro qua culpa, damnantur notabili*; and § 3, *similiter adulteros, &c.* Here infamy, by the crime, is distinguished from infamy by the sentence; and the law adds, § 7, *hi omnes supra dicti nec ad sacros ordines promoveri debent, nec ad accusationem vel testimonium admitti.* And this is agreeable to the maxim of the civil law, *l. 45, D. de Ritu Nuptiarum, § pen. quia factum lex non sententiam notaverit.*" Now, supposing that Graham were to be examined, and to accuse the defender as guilty with him, he becomes infamous in law, and consequently is not to be credited.

The pursuer answers, That the distinction between *infamia facti* and *infamia juris*, is fully established in the modern law and practice of Scotland. It may be questioned whether simple adultery, when a sentence follows, be sufficient to create an *infamia juris*. But it is certain that, before sentence, it has no such effect; and hence an acknowledgment of adultery before the minister and elders, *ad levandam conscientiam*, has been held no objection to a witness,—*22d February 1709, Tailor against Lord Lindores.*

The *fourth* and last objection is to this effect:—the defender takes it for granted, that Graham, if examined, may refuse to answer. If he does answer, when there is no legal compulsitor against him, he is plainly an ultroneous evidence, and, as such, his testimony will be set aside. The pursuer does not seem to make any answer to this objection, other than that Graham, if guilty, is bound in conscience to bear witness. Your Lordships will judge how far the

objection of ultroneous witness, as understood in practice, is applicable to the case of Graham. It remains with your Lordships to determine whether the cause ought to be remitted *simpliciter*, or with an instruction.

KENNET. As the defender, in the consistorial court, is not obliged to bring any proof, till the proof of the pursuer is concluded, it becomes necessary now to determine as to the examination of Sir William Maxwell. We must judge of the case, not of the man: he falls within the rule: there is no *penuria testimonium*: there is no evidence that he is a necessary witness. As to Latchemo, that he is a slave is no legal objection. Slavery is not the same now as among the Romans. It is fit to inquire what sort of a man he is, and what are his principles. But this is left entire by the judgment of the consistorial court. Graham ought to be received as a witness. He cannot clear himself by accusing the defender. He is under no *infamia juris*. The necessity of the case obliges us to examine such witnesses as can be had.

PRESIDENT. Occult crimes are to be discovered, and Courts will get over objections in the discovery of occult crimes. As to Latchemo, perhaps it may be proper to take declaration where oath is not proper, as was determined by the Court of Justiciary, in the trial of *Forbes*, the schoolmaster of the Poor's-house of Dalkeith. This, however, is left undetermined by the commissaries, and will be judged of by them hereafter.

AUCHINLECK. As to Sir William Maxwell, his interest is out of the question, and I am surprised that it should have been pleaded. Sir William's character is in itself irreproachable, but I wish to see a witness altogether disengaged from prejudice. Lady Maxwell has stated herself as a party. Declarations have been taken from witnesses, and in writing too. This is taking too active a part. Sir William assisted Lady Maxwell in precognosing witnesses, and therefore I would not receive him to bear evidence.

JUSTICE-CLERK. When an incident of so interesting a nature occurs in a family, it was natural for Sir William to assist in making inquiries. My doubt is, as to the matter of law, that he is within the prohibited degrees. This exception, in law, might be got over, were there any proof of his being a necessary witness—but there is none.

ALEMORE. There is no occasion to talk of Sir William Maxwell's character; for what we pronounce as law to-day, with respect to Sir William Maxwell, will be law to-morrow with respect to James or Thomas. Sir William may be a necessary witness; but, till that is shown, he is within the rule.

PRESIDENT. The objection of relation is good in general—but such a person is admissible from circumstances. There may be an objection, by way of reply, that the witness has taken a side, and this will bring back the objection to its original state. I think that the objection to Lady Maxwell's evidence ought to be determined by the commissaries before that the objection to Sir William's evidence is determined; and I would remit with that instruction.

On the 5th December 1770, “the Lords remitted *simpliciter* as to William Graham and Latchemo; but with this instruction, as to Sir William Maxwell, that, before advising the objections as to him, they take trial of the objections as to Lady Maxwell.”

For Mrs Nicholson, Ilay Campbell, H. Dundas. Alt. A. Lockhart, J. M'Claurin, Advocatus. Reporter, Hailes.

1771. February 18. Affirmed on appeal.

1770. November 2, and December 6. MISS ANNE BRUCE of Arnot *against* JAMES BRUCE CARSTAIRS of Kinross.

PRESCRIPTION—TAILYIE.

An Infertment in fee-simple, upon a precept of *clare constat* in the superiority of lands contained in a deed of entail, with possession maintained of said lands for 40 years, but which, *quoad* the property thereof, had been originally acquired upon a different title, *viz.*, the right of apparency, found sufficient by prescription to work off the limitations of the entail, and to establish a right both to superiority and property in fee-simple.

[*Fac. Coll. V.* 150; *Dict.* 10,805.]

November 2. Being in the Outer-House, I did not hear the first part of the reasoning upon the bench. I only learnt that the President had changed his opinion, and now held that the argument upon prescription was good.

PITFOUR. Our prescription of forty years is like the *prescriptio longissimi temporis* of the Roman law. It requires no *bona fides*. Thus, if a tenant, possessing under a tack, should obtain a charter of property from the Crown, and, by the carelessness of the master, should pay no rent for 40 years, his right under the charter will be effectual, notwithstanding his *initium possessionis* was a temporary right—and that he could have no pretence of *bona fides*. By our law, all that is required is a charter and possession.

MONBODDO. The fact of possession is clear. My only doubt was whether the possession ought to be ascribed to the infertment on the precept of *clare constat*, or to the right of apparency. From the arguments in Miss Bruce's memorial, I am become a convert to her, and think that the possession must be ascribed to the infertment.

COALSTON. I have always considered the question as to imputing possession, where there are two rights, to be of great difficulty. It is true that there must be no inquiry into the *initium possessionis*; but that does not affect the present question. When the same person has a right of property, under separate titles, he may ascribe his possession to that title which is most beneficial. The creditors of Sir Thomas, or Sir John, might also have done so. But my difficulty is, how far the one heir can do this to the prejudice of the other.

JUSTICE-CLERK. In modern practice, the right of apparenry has become a stronger title than it was anciently. According to the feudal constitutions, the heir apparent had no interest in the estate. When a person has a complete and perfect title, as Sir John Bruce had, and at the same time an imperfect right of apparenry, as apparenry is, it is natural to ascribe his possession to the perfect title, and not to the imperfect right. During the 45 years that Sir Thomas and Sir John possessed, they must have had frequent occasion of ascribing their right to the feudal title, by removing tenants; for, as heirs-apparent, they had no right to remove tenants. If there was an estate in fee-simple, belonging to Sir John Bruce, as Lord Coalston admits, how can it be said that the fee-simple descends to the heir of entail, and not to the heir of line?

On the 22d November 1770, the Lords sustained the defence of positive prescription.

Act. R. M'Queen. Alt. A. Lockhart. Reporter, Kaimes.

December 6. COALSTON. The island is not in the body of the contract. The marginal note is not probative. Yet Sir William Bruce might have homologated, and did homologate. This appears from the possession by John Bruce and other circumstances. It is true that limitations in tailyies cannot be extended. The homologation would not subject to irritancies as to strangers, but would as to heirs.

AUCHINLECK. The transaction in 1703, when *The Earl of Morton* disposed the apprisings, is an actual deed disposing the island to heirs-male of tailyie, in corroboration of former rights. This shows that the island was supposed to belong to the family.

PITFOUR. I doubt how far we can make up a right to lands from intention. That may come in another way by means of the marginal note, informal, but homologated. This may do, but I cannot separate it from the tailyie, and say that it is null as to the tailyie, and yet good as to the dispositive part.

COALSTON. That question is not before us at present.

ALEMORE. The deed has been homologated. All the family transactions, during the life of Sir William, proceed upon the supposition of the disposal of the island being valid. I think that homologation would be good against strangers as well as *intra familiam*. We do not extend tailyies when we say that, in law, the homologation of a null deed is effectual.

GARDENSTON. No estate can be taken from the heir merely by intention.

On the 6th December 1770, "the Lords found that the defender has condescended on acts of homologation sufficient to remove the objection that the marginal note is not properly tested;" and assoilyied from the removing—altering Lord Kaimes's interlocutor.

Act. J. Swinton, R. M'Queen. Alt. A. Lockhart, D. Rae, &c.

1772. April 7. Affirmed on appeal.

1770. *December 6.* HERITORS and KIRK-SESSION of COLDSTREAM *against*
HERITORS and KIRK-SESSION of HUTTON.

POOR.

The Parish where the Pauper has had his residence for the last three years, liable for his maintenance.

[*Fac. Col. V. 155 ; Dict. 10,574.*]

GARDENSTON. There is something in this specialty that the pauper has been resident eight years in different parishes since he left Coldstream.

COALSTON. I was much against the decision in the case of *Baxter*. I did not think that we could get over the proclamation 1698, confirmed by Parliament—but as it was so decided, I shall give up my own private opinion. If the judgment in the case of *Baxter* stands, we cannot make a distinction—for the Acts, previous to the proclamation, say, the parish he had been last in for three years.

PRESIDENT. The general practice was what determined the Court in the case of *Baxter*.

PITFOUR. My chief difficulty, independent of the statute, was expediency. I relish the distinction made by Lord Gardenston.

ALEMORE. If we are to be directed by expediency, the parishes, such as Coldstream, where great public works are carrying on, are enriched by those works, and therefore ought to bear the greater burden.

PRESIDENT. Will you leap over all the intermediate places of this man's residence, and resort to the place of his birth? If you leap over the three years' residence at Coldstream, and consequently the 40 years' residence at Swinton, and resort to the place of birth?

On the 6th December 1770, “the Lords, in regard the parish of Coldstream was the parish in which John Whitlaw, the indigent person, had his last three years' residence at one space of time; therefore found the letters orderly proceeded at the instance of the Parish of Hutton;” adhering to Lord Barjarg's interlocutor.

Act. R. Blair. Alt. J. M'Claurin.

1770. *March 1 and Dec. 7.* MESSRS HASTIE and JAMIESON *against* ROBERT ARTHUR.

SALE—ARRESTMENT.

A Merchant abroad having consigned a cargo of goods to his Correspondent at home, and having transmitted him the bills of loading, the Consignees found to have a Special Property therein, or right preferable to the diligence of other Creditors, to the extent of the payments they had advanced, and the obligations they had come under for the Consigner, at the date of the competing diligence. Such right of Special Property extends not to the Ship, or the overplus of the ship's provisions and stores, and an arrestment used by the Owner's creditor in the hands of the shipmaster, found sufficient to attach these subjects. But the said arrestment found to be inept and insufficient to attach the freight both of the goods consigned, the property of the Arrestor's debtor, and of separate goods on board, the property of other persons.

[*Vide supra*, 1st December 1768.]

PITFOUR. The question before the Ordinary was, Whether the arrester or the consignee preferable? This depended upon the question where the property lay. It seemed plainly in Dunlop. No allegations of practice or expediency can get the better of the principles of law. Hastie and Jamieson were no more than the factors for Dunlop. There is no meaning in the words *jus quæsitum*, unless you bring this right to a legal sense. Was it property, *pignus*, or hypothec? What is pleaded for Hastie and Jamieson would be destructive of trade: it is the life of trade that the transmission of property may be known, and latent deeds rendered ineffectual. It is a rule as old as the Romans, and adopted by every commercial nation,—*traditionibus, non nudis pactis, dominia transferuntur*. Every nation will deal confidently with us if that is the rule: but otherwise, no nation will trust us. Every private hypothec must be ruinous. It is said that an arrester cannot take a subject but *tantum et tale*, as in the debtor: Does that imply that all the latent obligations of the debtor go along with the subject? The proof offered is not relevant. Merchants, who have lost by trusting to consignments, will be of one opinion: merchants, who have prevailed upon arrestments, will be of another,—for every man thinks his own cause right. I would require the judgment of courts, or the opinion of writers, that such is the established practice: but nothing of this kind is offered.

KAIMES. A man's property may be affected by diligence, whatever private under-obligations he is under. Suppose the ship and cargo to have been sold to Hastie and Jamieson, apprehension then might have been good: but that is not the case here; for, even after the most complete delivery, the goods would have been still the property of Dunlop, not of the consignees.

COALSTON. This question is of the highest importance in point of precedent, if it is true that, in commercial countries, the merchants have a different conception from what my brethren have. A merchant writing that he was to send goods, does not give a right to consignees; neither does the putting goods on

board, and taking a bill of loading, so long as it remains under the power of the merchant consigner: but here there is a bill of loading actually transmitted to a correspondent. The averment made so strongly as to the ideas of the mercantile world, that I must examine their grounds. There seems a clear ground from the delivery of a bill of loading to the merchant at home: this creates a right in him. Suppose that a debtor, meaning to pay a particular debt, takes an obligation from a friend payable to a certain creditor, and transmits it to that creditor; here is a *jus quæsitum*. Or, suppose a sum of money in the same circumstances,—the debtor puts it in the hand of a friend, and takes his obligation to pay it to a creditor, and transmits this obligation: this would be good against other creditors, and yet the money would remain the property of the debtor, and perish to him. In this case I have some difficulty as to the proof of delivery.

MONBODDO. I do not enter into mercantile considerations, of which I am no competent judge. Lord Pitfour puts the case upon too narrow a bottom of property not being transferred. It is sufficient for my argument if the consignee had a right of security. Such right was established by the contract between Dunlop on the one side, and Hastie and Jamieson on the other. He might have sent no cargo,—he might have recalled the cargo and bill of loading sent; but, by actually sending the bill of loading, he put this out of his power.

GARDENSTON. The whole American trade is conducted in that very way which the interlocutor condemns. Here I would prefer the opinion of merchants to that of the most enlightened bench of judges: the one would judge from daily experience, the other from abstract principles. I think that a consignment by bills of loading in payment is equivalent to an assignation in security, capable of giving a right to hold, but not of conveying property. Suppose a bag of money had been sent with a bill of loading, would arrestment have intercepted it? Suppose a different bill of loading should thereafter be granted to another creditor, the first would be still preferable; the foreign merchant could not effectually recal it.

JUSTICE-CLERK. I am not called to give my opinion upon the abstract case, when a bill of loading is sent upon a specific debt: that is not the case here: I take the case upon the contract. Were such a contract to be effectual, it would stop the trade with America altogether, instead of supporting credit. If there had been a simple consignment, no one doubts that the arrestment would have been effectual. Here is the same thing,—no more than a consignment of goods to account, not in payment: the debt was not so much as due at the time.

ELLIOCK. Here was a mutual contract for consignment, not in payment of debt, but to account. A merchant may recal a bill of loading, though the contrary has been here asserted.

AUCHINLECK. Suppose that the foreign merchant had sent over a deed recalling the consignment, would that not have been good against the consignatar?

PRESIDENT. I take this cause upon its own circumstances, and think that the contract cannot subsist to the prejudice of the arresters.

On the 1st March 1770, "The Lords preferred the arresters;" adhering to Lord Pitfour's interlocutor.

Act. A. Lockhart. Alt. D. Rae, J. Montgomery.

December 7.—GARDENSTON. The freight was not under the view of the House of Lords, nor does it come under any of the interlocutors. The arrestment by Arthur cannot carry the freight due by the proprietor for his own goods. The freight of the other goods belonging to other parties was payable to Hastie and Jamieson.

AUCHINLECK. You can only arrest in the hands of one who is debtor; whether the freight belonged to Dunlop or not makes no difference. The shipmaster had a *jus exigendi* as to the freight, and might be considered as a creditor; but surely he was no debtor in the freight.

JUSTICE-CLERK. How can the shipmaster be made holder of the freight against his employer? If Arthur had arrested the freight in the hands of the different proprietors of the goods, the arrestment would have been good; although it might then be uncertain whether the goods would arrive safe. As to the arrestments in Hastie's hands, the moment the goods were received, the freight was as much the special property of Hastie as the goods themselves.

COALSTON. If the shipmaster had received the freight, the arrestment would have been good: but that is not the case. The shipmaster was rather creditor than debtor. Arrestments in Hastie's hands good; but only effectual after payment of what is due to Hastie.

PITFOUR. Arrestment is competent, not only against debtors, but against one having the custody of goods. It has been found by the House of Peers that the consignation gave a preferable right to the consignee; but *quousque? tanto minus* the freight. As to freight, the shipmaster is in the same situation as before the judgment. Freight is the fruit of the ship, and arrested properly by arrestment of the ship.

ELLIOCK. How can the freight due for the goods of other persons be in the custody of the shipmaster?

PRESIDENT. Suppose a man to consign a horse from the East Indies, the consignee may have a special property in the horse: the arrestment of the horse will not give a right to the freight. The shipmaster cannot say, I will detain the horse, because the freight of the horse is arrested.

JUSTICE-CLERK. Could it be said, upon an accounting, that the shipmaster was debtor in the freight, because it was in his power unlawfully to have detained the goods until the freight was paid?

PITFOUR. The shipmaster was not bound to deliver the goods till the freight was paid. On the contrary, he was bound to detain the freight. Suppose that the goods were worth £2000, and the freight 1-20th part, he was bound to deliver no more than £1900.

On the 7th December 1770, "The Lords found the freight not carried by the arrestment."

22d December 1770, refused a petition and adhered.

Act. R. Cullen. *Alt.* H. Dundas.

Reporter, Pitfour.

1770. *August 3 and December 11. ELIZABETH TOD against DAVID WEMYSS.*

IMPLIED DISCHARGE AND RENUNCIATION.

The *jus relictæ*, whether excluded by certain conventional provisions in the marriage-contract?

[*Faculty Collection, V. 174; Dictionary, 6451.*]

PITFOUR. There is a decision, not in the Dictionary, *12th December 1712, M'Aulay of Ardcaple*, observed by Forbes, which determines this case for the relict. Upon this decision I have given opinions and have pronounced interlocutors which have been acquiesced in. Here a clause of conquest makes a subject heritable *destinatione*, which will exclude the question—how far this will hold? If sums of money, they would be exemed from the relict's part; as also stocking and furniture. Bills also would be exemed.

KAIMES. The nature of the contract ought to be taken into consideration; and from it we may conclude, that it was meant absolutely to exclude the *jus relictæ*. The last part of the interlocutor lays down rules for judges when words are clear; but here the meaning is so far from being clear, that, if we adhere, we shall make a deed different from what the parties meant. Independent of the statute 1681, a wife was not entitled to legal provisions if she had conventional. The statute does not say that an express discharge is necessary when intention is plain.

AUCHINLECK. The widow cannot have a share of the conquest, because she is otherwise provided. This case is favourable to the widow; but, suppose that her nearest in kin were claiming, that would sound odd. The *jus relictæ* is not expressly excluded; but a provision is made, just as if it had been the intention of parties to exclude it.

ALEMORE. It is the principle of the law of Scotland that conventional provisions do not, *ipso facto*, exclude legal. So stood the law as to the terce before the Act 1681, notwithstanding the opinion of Balfour and Craig to the contrary. As to the clause respecting conquest, I think that it comprehends bills.

MONBODDO. It is fixed that the *jus relictæ* is not excluded by conventional provisions. Had I seen words implying a discharge, I should not have required direct words.

On the 3d August 1770, "The Lords found the relict totally barred;" altering Lord Monboddo's interlocutor.

Act. A. Bruce. Alt. Ilay Campbell.

Diss. Alemore, Pitfour, Kennet, Hailes, Monboddo.

1770. December 18. ANDREW JOHNSTON and BEATRIX COLQUHOUN *against*
The TRUSTEES OF FAIRHOLM'S CREDITORS.

BANKRUPT—ARRESTMENT.

Trust-disposition by Bankrupts to certain trustees for behoof of their Creditors, reduced
upon the Act 1696, c. 5.

Non-acceding Creditors, using arrestments with the public banks, where the trustees had
lodged the bankrupt's funds, preferred upon their diligence.

[*Faculty Collection, V. p. 179 ; Dictionary, Appendix I. ; Bankrupt, 5.*]

COALSTON. Once and again I have had occasion to give my opinion that such trust-dispositions are not reducible by common law, nor upon the Act, 1621 ; neither do I think that they are reducible upon the Act 1696. That act relates to dispositions made in preference to other creditors. A disposition to all the creditors, that they may come in *pari passu*, is not a preference to any. Still the creditors may do diligence if this is done before the disponees complete their disposition. As to decisions of this Court, when a uniform tract appears, I will follow the beaten path. But there are decisions on both sides : Such as *Watson's Creditors*, in 1725 ; and *Jackson's Creditors*, in 1757, on the one side ; and *Snee, Moodie*, and *Dunlop's Creditors* on the other. A good answer to Moodie's case is stated in the papers now in Court. In *Snee's* case there was a strong objection to the form of the disposition. The great argument in those cases arose from this, that powers were put into the hands of trustees not named by the creditors. That, however, does not occur here ; for the trustees are taken bound to denude. When there are decisions on both sides, I will rather follow the sense of the statutes, as I understand them, than any decision. The opinion of the nation is for trust-rights notwithstanding all embarrassments thrown in their way.

MONBODDO. A trust-right is neither reducible at common law nor upon the statutes 1621 and 1696. I am clearly of opinion that creditors are not barred from doing diligence. No principle of law or equity can prevent this ; but then it must be diligence in the hands of the debtor of the bankrupt. The creditor must not sit with his hands across and wait till the trustees have recovered the money. Money lodged in the bank by the trustees is the same thing as money already paid over to the creditors. As to the decisions of the Court, a *series rerum similiter judicatarum* makes law in every country ; but here there is no such series.

PRESIDENT. I am unwilling to enter into the question of the expediency of such trust-rights, because I know that many of my brethren differ in opinion from me. I am sorry to see this question now agitated. I thought that it was settled. The Act of Sederunt, 1735, proceeded upon a narrative of the bad consequences of trust-rights. In the case of *Jamieson against Digges*, it was

the opinion of the Court, that the general question should not be disputed. The case of *Moodie* was determined upon the general point. The case of *Montgomery* against *The Creditors of Nathaniel Duke of Leaths*, from an interlocutor of Lord Auchinleck's, was no less in point. So also was the case of *Dunlop*. In the decree of the House of Lords, affirming that judgment, no specialties are mentioned.

ALEMORE. Surely I am much mistaken if the case has not been frequently decided. However, since we must have it over again, with all my heart; I shall give my opinion, not doubting but in a year or two I shall be called to give it again. What is the common law? If the civil law,—the great principle of it is *vigilantibus non dormientibus leges sunt scriptæ*. The whole genius of our law is to prefer creditors, according to priority of diligence. That is the plan of the Act 1621. The Act 1696 meant that no debtor should have it in his power to alter the situation of any of his creditors. The creditors' right is not merely his bill or his bond, but the diligence which he is entitled to. It is said, I do not mean to exclude diligence. How so? If you cut me out by your trust-right before I know any thing of the matter. Show me the law of any people upon earth that have found trust-rights to be the common law of any country, Roman, English, French, Dutch. How were those laws so short-sighted as not to see that this was the common law? Are we alone so perspicuous as to discover this to be our common law. If specialties are to be presumed, in the judgments of the House of Lords, none of them will bind us; for they are shortly expressed: and we may always make out some specialty in every case. If all creditors concur, a trust-right is good; but by what law now existing can the majority control the minority?

KAIMES. Suppose I have 20 creditors, and find my affairs going wrong; in order to provide against the partiality of the law, which favours the diligence of one to the disappointment of another, I dispoise my whole effects to them all, what law prevents me? A man has generally too many creditors to remember them all. He, therefore, dispoises to A, B, C, for the behoof of all, with power to creditors to vary this nomination, and appoint whom they please. A, B, C, are only put *in dicis causa*.

PITFOUR. The common law is on the side of trust-rights. In former times dispositions *omnium bonorum* were generally to favourite creditors. The Court did not reduce them, but constructed them as they ought to have been granted; that is, for behoof of the whole creditors. There is another evidence that trust-rights are favoured by the common law. When one comes out upon the Act of Grace, he is obliged to grant a disposition to all his creditors. It was never doubted that such disposition was good, unless the Act, 1696, stood in the way. In the question upon a disposition granted by *David Beat*, in 1744, to trustees, all the arguments against such dispositions were used by Charles Erskine, afterwards Justice-Clerk. He had a feeble antagonist in myself, and yet he was unsuccessful. [This affected modesty is disgusting, for every one knows that Lord Pitfour is a great lawyer, and that he is zealous, beyond measure, in supporting his own opinions.] *Beat* fell not within the statute 1696, and therefore his case was determined at common law. The only difficulty is from the statute 1696. I cannot see where the difficulty lies. The whole strain of that statute breathes

the contrary. The words of the Act exclude the construction put upon it. Can the Act mean that the debtor shall do no deed for facilitating justice and equality among the creditors, without preferring any one? The Act refers to the case where some creditors are preferred to others. This trust-deed is not only not hurtful, but is necessary for the safety of the creditors. The same principle of our law appears in the preference of adjudications *pari passu*. And also in the case of executors-creditors. If a man makes a deed to his creditors, A B, &c. he might chance to omit some, and hence a partial preference might arise: it is proper therefore to name a trustee for the behoof of all. I remember, very well, that, when trust rights came in, they were so fair that the world approved of them. The first bias against them occurred in the case of *Snee*; that was a monstrous trust-right, evidently partial. This inflamed the Lords against trust-rights, and occasioned the general declaration subjoined to the judgment in the case of *Snee*. If the Court had meant that a man could do nothing in order to produce an equality among his creditors, they would not have given the judgment which they gave in the case of *Beat*, 1744. If the bankrupt named the trustees, and did not leave them to be removed by the creditors, there might have been a difficulty: but that is not the case here. I can see no *series rerum similiter judicatarum* to the contrary. None of the decisions apply to the circumstances of this case.

AUCHINLECK. I considered this point to be as much fixed as any thing in law. It was thrice determined in the case of *Dunlop's Creditors*. In the Outer-House I have pronounced many judgments upon it: it is established also in justice. Every creditor may, by our law, attach his debtor's effects. No debtor has power to put the creditor's payments in the hands of a factor. As to the argument of inexpediency and expediency, much may be said on both sides. If we encouraged trust-rights, we shall have a shoal of unfair destructive trust-rights. It is said that the trustees are to be named by the creditors.—But what right has a bankrupt to create a copartnery among his creditors, and to provide that every thing shall be determined, as in a copartnery, by a majority of the votes? That is in prejudice of the creditors, as it prevents them from employing a factor of their own, and doing for themselves. It is not enough to cobble trust-rights, and mend this hole and that hole: they are rotten altogether.

KENNET. The resolution in the case of *Snee*, 1734, determines the point that the diligence of creditors cannot be debarred by a trust-right. The case of *Moodie*, in 1756, was determined contrary to my opinion, by a great majority of the Court. I should be sorry to see this altered, by the Court varying its ideas, or by the judges being altered. The point was certainly determined upon a hearing in presence, appointed on purpose to determine the point.

JUSTICE-CLERK. It is certain that the hearing in presence was in order to fix the law. My own private opinion is for trust-rights. The case of *Moodie* however, has been followed out by many decisions: every practitioner about Court knows this: there are recent decisions, numberless, to the same purpose. I myself have given many decisions in the Outer-House upon that point, and parties have acquiesced. This shows the opinion of the bar in that matter. I have no reluctance at giving my judgment against the trust-right—for it may

be the means of uniting the nation to concur in promoting the noble and generous intention of the Court to improve the law, and establish it on a better footing. [Alluding to a bill which the judges had been deliberating upon.]

GARDENSTON. In a matter of law I may hesitate, but a matter of fact shall always determine me. After so many decisions upon this point, it is neither proper nor decent to vary. Were we to pronounce a different judgment now, it would be a solitary decision, and consequently of no authority.

On the 18th December 1770, "The Lords sustained the reasons of reduction of the trust-disposition libelled, in so far as the pursuers have an interest therein;" adhering to Lord Gardenston's interlocutor.

Act. D. Rae. *Alt.* J. Montgomery, &c.

Diss. Kaimes, Pitfour, Coalston, Monboddo.

N.B. On report of the Lord Gardenston, the Lords repelled the objection to the arrestment, "that it was laid on in the hands of the trustees after the money of the debtor had been recovered of them, and lodged in the bank;" without a vote. The same judgment had been given, *25th February 1770, Monro against Trustees of Dunlop.*

1770. December 22. HUGH M'KAY against CHARLES BLACKSTOCK.

EXECUTOR—LIS ALIBI PENDENS.

The Executor of a party, deceased in Jamaica, had found security in terms of the law of the island. He was sued in the Courts of Jamaica by a creditor of the deceased. Happening to come to Scotland, the pursuer had him apprehended on a *meditatione fugæ* warrant. The Lords ordered him to be set at liberty.

BLACKSTOCK was creditor to the deceased Hugh M'Kay of Jamaica, to whom the above-mentioned Hugh M'Kay was executor, and in that character had found security for his intromissions in Jamaica, in conformity to the laws of the island. Blackstock commenced an action in the Courts of Jamaica against M'Kay, as executor, for the recovery of his debt; but, M'Kay having come to Scotland during the dependance of that action, Blackstock gave in an application to the Sheriff of Edinburgh, and had him apprehended as *in meditatione fugæ*, and incarcerated by a warrant which ordered him to be detained until he should find caution *judicio sisti*, in any action brought, or to be brought against him for payment of the debt in question, in the courts of Scotland. M'Kay presented a bill of suspension and liberation, on advising which the following procedure took place.

COALSTON. It was determined, in *Sir Archibald Grant's* case, that an executor having found security in England, was not bound to account here. This is reasonable, for otherwise matters would become inextricable. The only diffi-

culty is, that it is averred that the suspender has absconded from Jamaica. But then this averment is not offered to be proved, and the intelligence from Jamaica does not imply that such is the case.

On the 22d December 1770, "the Lords ordained the suspender to be set at liberty."

*For M^r Kay, A. Lockhart. Alt. H. Dundas:
Reporter, Kaimes.*

1771. January 23. JAMES CHALMER *against* ROBERT HAMILTON.

PROVISION TO HEIRS AND CHILDREN—FACULTY.

Provisions to children executed in consequence of a reserved faculty, and inserted as a burden on an heritable bond granted by the father to one of his Creditors, whether effectual against personal creditors?

[*Faculty Collection, V. p. 194; Dictionary, 13,054.*]

AUCHINLECK. The £5000 bond granted to Mr Hamilton was in effect for £5000, minus 6000 merks; for to that extent there was a power of charging reserved. This reserved power was an estate in the father, and therefore is affectable by his creditors. To this, neither Mr Hamilton, nor the daughters of Hugh Montgomery could object. If the daughters got their provisions antecedent to the contracting of the debt in Chalmer's person, such provisions cannot now be challenged.

COALSTON. This bond is of a very singular form. I do not remember ever to have seen one of the kind. There is a reservation of liferent, and of a faculty to burden to the extent of 6000 merks, for provision to the children. The first was certainly affectable by creditors, though intended for Montgomery's own aliment: the second is a power to burden for a special purpose. Should be sorry if such reservation was not affectable by creditors, for it would be the source of much fraud. This question was never specifically determined. Bonds of provisions must be proved delivered. *Here* no proof of delivery.

PRESIDENT. It does not appear that Montgomery ever exercised his powers as to *Jean*, one of his daughters, nor that he was under any obligation whatever to settle any part of the 6000 merks on the daughters of his daughter Mary; which, however, he did.

On the 23d January 1771, the Lords "remitted to the Ordinary to find that the share of *Jean*, not provided by Hugh Montgomery, must go to his creditors;" altering Lord Kennet's interlocutor.

Act. R. Blair. Alt. H. Campbell.

N.B. In the report of this case in the Faculty Collection, it is said that the Lords refused the petition, and remitted *simpliciter* to the Ordinary.

1771. *January 23.* JAMES PATERSON *against* WILLIAM TAYLOR.

PROOF—HUSBAND AND WIFE.

Oath of the wife competent to prove furnishings made to herself or the family.

[*Faculty Collection*, V. 199; *Dictionary*, 12,485.]

AUCHINLECK. Mrs Taylor was *præposita* as to household affairs, and her oath will be good as to furnishings for her family; but her oath will not be received as to other matters in which she is not presumed to have any *præpositura*.

COALSTON. This distinction was made during this winter in the case *Faulds against Pollock*.

On the 23d January 1771, "the Lords found those furnishings only which were made to Mrs Taylor, or her family, relevant to be proved by Mrs Taylor's oath, and remitted to the Lord Ordinary, reserving the consideration of expenses to the issue of the cause;" altering Lord Gardenston's interlocutor.

Act. A. Elphinston. *Alt.* J. Boswell.

1771. *January 24.* EARL OF EGLINTON *against* JAMES FULTON.

REMOVING.

Warning held to be necessary, where the tack contained a clause to remove without it.

[*Fac. Coll.*, V. 205; *Dictionary*, 13,886.]

GARDENSTON. Some intimation was necessary, not in strict law, but from reasons of humanity. I think there was intimation enough. A tack is a *bona fide* contract. There is no pretence of *bona fides*: but the tenant is catching at every quibble, in order to retain possession. Tenants have found so many devices that it is almost impracticable for a master to get rid of them at the expiry of the lease. They take an additional year's possession at law. This ought not to be encouraged.

AUCHINLECK. On the 12th April 1770, the tenant was charged to remove at Martinmas 1769 and Beltane 1770; and so the Ordinary found, which was an oversight. He ought to have sustained the charge as sufficient warning to remove at Martinmas 1770, and Beltane 1771.

On the 24th January 1771, "the Lords found that the notification given in April 1770, was sufficient to make the defender remove at Martinmas 1770, and *Beltane* 1771; and, in respect that Martinmas 1770 is past, ordained her instantly to remove from the arable land, and at *Beltane* from the houses and grass;" altering Lord Pitfour's interlocutor.

Act. A. Lockhart. *Alt.* G. Ferguson.

1771. *January 24.* JOHN LAWRIE *against* MARY WADDLE.

TITLE TO PURSUE.

Objection to the Title of a Pursuer of a ranking and sale, removed by the concurrence of the party having interest.

[*Fac. Col. V. 202; Dictionary, 16,130.*]

HAILES. Had there been a discharge of the obligation to retrocess, it is admitted that there would have remained no objection. What is the difference between discharging this obligation and authorising the trustee to proceed, as if there had never been any such obligation?

COALSTON. I am surprised to see a petition of this kind given in. The whole intention of the litigation is to occasion delay.

On the 24th January 1771, "the Lords sustained the title to pursue, and found the petitioner liable in the expenses of the answers to the pursuer;" adhering to Lord Kaimes's interlocutor.

Act. D. Dalrymple. *Alt.* A. Wight.

1771. *January 25.* ALEXANDER GILLIES *against* ADAM MURRAY.

PROOF—EXECUTION.

Parole Evidence incompetent to rectify a mistake in the record of Judicial proceedings.
Executions of Inhibitions must bear three oyezses and public reading.

[*Fac. Coll. V. 207. Dict. 3,795.*]

PITFOUR. Mistakes are incident to mankind. *Here* there is nothing more than a mistake in writing *five* instead of *three* in the execution. As to the three

oyezes, when execution was the whole of the intimation. A great exactness was required : not so now, when, to execution, there is superadded registration.

JUSTICE-CLERK. There is no objection to the *execution* of the inhibition. The only objection is as to the *date*. The error of the date may be proved.

PRESIDENT. The Court is going very far to rectify errors in legal acts by the means of parole evidence. The clerk of the bills does not examine the executions : he takes that upon the faith of the writer who presents the bill. Here, then, we are to trust every thing to the writer, and, of consequence, to the party himself.

COALSTON. This cause is not to be determined upon principles of equity. Creditors must stand or fall by the priority and propriety of diligence. In order to support the inhibition, the execution must be produced. An inhibition on the 3d of July cannot be supported by an execution of summons on the 5th of July. The execution cannot be supplied by witnesses : no more can the dependance. Besides, the clerk of the bills cannot swear that this summons was the summons shown to him : The *oyez* (or hear all) is the publication, and the want of it is the want of publication.

HAILES. The pursuer pleads, that, to require critical accuracy in the *minutiae* of legal acts, is to throw snares in the way of suitors. I do not think so. We live in an age where there is so much carelessness and inattention, that, if we relax from the rigour of form, every thing will go into inextricable confusion. If the pursuer has suffered by the error of the person he employed, let him seek his damages as he best can. I am also for sustaining the second objection, not because the execution does not bear three *oyezes*, but because it does not bear *lawful publication* : and this is just what was the opinion of the Court in 1681, as observed by Lord Stair. *Lawful publication* may imply *three oyez*; but we cannot presume lawful publication where no mention is made of *publication* at all.

MONBODDO. As all our judicial proceedings must be in writing, evidence by witnesses cannot be received to rectify errors in them.

KAIMES. Here there seems a contest of reality against law : but, when an inhibition is *ex facie* regular, will it not stand till it be reduced ?

On the 25th January 1771, the Lords "sustained the objection, that the execution of the inhibition appears to be prior in date to the execution of the summons ; and also the objection that the execution of inhibition does not bear *three oyez*es."

Diss. as to the first objection, Pitfour, Auchinleck. As to the second, Pitfour, Auchinleck, Elliock.

Act. H. Dundas. *Alt.* G. Buchan, Hepburn.

Reporter, Barjarg.

1770. *August 3.* JEAN COALSTON *against* ARCHIBALD STEWART.

FOREIGN.

The Lord Chancellor's certificate upon an English commission of Bankruptcy discharges all Debts due to persons residing in Scotland prior to the Bankruptcy.

[*Faculty Collection*, V. 110 ; *Dictionary*, 4,579.]

COALSTON. Peter Coalston, though born in Scotland, had lived 50 years in London *animo remanendi* : it is therefore just the same thing as if he had been an Englishman born. In this light, the effect of the bankrupt obtaining a certificate from the Chancellor of England, is to liberate him from all debts prior to the bankruptcy. The estate was not in Scotland at the time of the bankruptcy, but it was a subject *postea quæsitum* ; so that this cause is different in its circumstances from those determined of late years upon the effect of the English statute of bankruptcy.

GARDENSTON. The statute has operated a discharge already : it is too late to seek to undo this.

AUCHINLECK. The certificate is not a discharge of the debt, but a *denegatio actionis*. This introduced in England from political reasons ; but will not restrain creditors in another part of the world.

ELLIOCK. In the case of *Cathcart*, when the Court found no sufficient evidence of his having complied with the terms of the statute, the House of Lords reversed. This implies that they thought that he who complies with the terms of the statute was free from his creditors for ever.

PITFOUR. The plain point of law is, Does the authority of the bankrupt statutes go *extra territorium* ? I answer, No ; both from defect of jurisdiction and intention. It is said that the *lex loci contractus* affects not only the solemnities of the contract, but also its essence. I differ in opinion. I cannot be apprised of the solemnities of another country than that where I am ; and, therefore, must contract according to its form. All the decisions are reconcilable upon this principle. In the case of *M'Morlan*, payment was made in England.

KAIMES. Of the same opinion. From the nature of the Chancellor's certificate, the bankrupt has an exception ; but this does not operate *extra territorium*. Suppose the Chancellor had declared the debt null, still this would have no effect *extra territorium*. The certificate gives a personal protection, and no more : such protection cannot operate farther than the granter's jurisdiction.

MONBODDO. Both the constitution and transmission of obligations must be regulated according to the laws of the country where the parties are ; so also discharge of obligations. Here a discharge not by the act of the parties, but by the operation of the law : the certificate of the Chancellor is like a sentence absolutor.

JUSTICE-CLERK. The House of Peers always take it for granted that the cer-

tificate operates a discharge against every debt within the jurisdiction, and against every debtor. The contrary doctrine is adverse to many decisions of this Court and of the House of Peers, particularly to the decision in the case of *Cathcart*. It would be fatal to commerce were it otherwise; for then an Englishman, having obtained a certificate, and coming to Scotland, might be attached by every English creditor. The debts of Scotsmen, not subject to the law of England, will not be affected by the certificate.

ALEMORE. In *Cathcart's* case it was taken for granted by the House of Lords that the certificate was effectual; but it was not determined. English creditors may arrest, &c. in Scotland, notwithstanding the certificate. Why should there be any difference as to his person: if you can arrest his person, the certificate is good for nothing here. In England it protects his person.

BARJARG. This case is not the same with that of *Thomson* and *Tabor*; for *there* the Court would not extend *comitas* beyond jurisdiction. But here the interlocutor of the Ordinary goes farther,—it abridges the jurisdiction of the Chancellor; for, at the time of the certificate, the creditor resided in England, and was bound by that law. In *Thomson* and *Tabor's* case, the subject was *extra territorium* of the Chancellor: here the contrary.

AUCHINLECK. The last decision of the Court in *Thomson* and *Tabor's* case, is upon the same principle with this: the one is a corollary of the other. The *discharge* of the debt only means that no action lies: the debt itself cannot be discharged. Particular constitutions are very expedient in different countries; but of no consequence *extra territorium*.

PRESIDENT. The Court determined, in the case of *Thomson* and *Tabor*, contrary to my opinion, that the certificate *non egreditur territorium*. I will not set my opinion against that of the Court in a question already determined.

KENNET. I do not think that the judgment of *Thomson* and *Tabor* limits us in this case. The question here is, Whether a debt, extinguished by the law of England, can be revived?

COALSTON. The effect of a certificate is a discharge of the debt: how can it be revived? Payment of a debt in England may be proved by witnesses, where, during the period of the statute of limitations, the debtor resides in England. Such proof discharges, and will operate in Scotland as a discharge, not from *comitas*, but from justice: the discharge is not *quoad omnia*, but only as to effects in England.

PITFOUR. The statute of limitations has no more force out of England than the statute of bankruptcy; but a presumption of payment would thence arise in Scotland.

KAIMES. The executor is taken bound to pay *just and lawful debts*. This has been determined in Chancery, a court of equity, to comprehend debts discharged by the certificate.

ELLIOCK. For altering the interlocutor. This does not impinge on *Thomson* and *Tabor's* case. Here a debt was extinguished by the operation of the law, to which both parties were bound, in consequence of their residence in England.

On the 3d August 1770, the Lords “found the pursuers barred from insisting, in respect of the proceedings on the statute of bankruptcy;” altering Lord Auchinleck’s interlocutor.

Act. G. Buchan Hepburn. *Alt.* D. Dalrymple.
Diss. Kaimes, Alemore, Pitfour, Auchinleck.
Non liquet, Strichen.

Judgment had been given in this case, 3d August 1771. A reclaiming petition was presented: answers were made. The pursuer prayed for a hearing in presence: the hearing began 25th January 1771. On the 26th, Lord Hailes happened to look at the bill: he observed that it was pasted on the back, and that the two partial receipts were on the paper pasted on both, written with the same ink, and at the same time. He likewise observed, that there was an appearance of writing under the pasted paper. In presence of the Court the bill was separated from the pasted paper, and it then appeared that there was marked on the original bill a receipt previous to the term of payment of the promissory-note for £14 sterling, and another receipt for £8 sterling, being within 30 shillings of the sum originally due.

On the 26th January 1771, the Lords found "that this action was founded on a gross fraud, and assoilyied the defender; and remitted to Lord Auchinleck, Ordinary, to do therein as he should see cause."

Act. J. Grant, H. Dundas. *Alt.* A. Wight, D. Dalrymple.

1771. February 5. WILLIAM REID *against* STEPHEN RONALDSON.

ARRESTMENT—HEIR *CUM BENEFICIO*.

The estate of the debtor, a minor, having been sold *auctore pratore*, the arresters of the price in the hands of the purchasers preferred, upon their diligence, to the other creditors.

[*Faculty Collection*, V. 213; *Dictionary*, App. I. *Arrestment*, II.]

GARDENSTON. An heir, *cum beneficio*, is proprietor, and, in every respect, heir; only that he has certain personal privileges. When a sale is brought by an apparent heir, the case is different: there he is not proprietor, but trustee.

PITFOUR. We naturally have a prejudice in favour of the *pari passu* preference of creditors; but it cannot take place here. The only method which an heir *cum beneficio* can follow, if he means to bring in the creditors *pari passu*, is not to sell till they all agree in a *pari passu* preference. If he *does* sell, the price must be affectable by the creditors.

MONBODDO. I lay aside the circumstance that Reid was a minor: he is in the common case of an heir. An heir *cum beneficio* is still *heir*, though having privilege: if he sell the estate, the price is affectable by his creditors.

On the 5th February 1771, the Lords “found the arresting creditors preferable;” adhering to Lord Kennet’s interlocutor.

For Reid,—R. M’Queen. *Att.* G. Ogilvie.

1771. February 6; and 1772, Dec. 8. JOHN BOYD against JAMES STEELE.

SALE—IRRITANCY.

An alienation of land, qualified with a Back-bond, Whether to be held a fair sale, or right in security?

[*Faculty Collection*, V. 260; *Dictionary*, 7,221.]

PITFOUR. In the case of *Lord Balcarras* and *Scott of Scotstarvet*, the lands were found redeemable where the purchaser had no power to require his money, although it was pleaded that it was hard to keep him bound while the seller remained free. In that case also, 40 years were allowed for redemption; and yet the order of redemption was not used for many years after the lapse of that period. The present subject of controversy is not a sale, but a right in security. It is, indeed, declared that this shall be held as an absolute sale; but that is *protestatio contraria facto*. It is of no moment whether there is evidence of premonition or not; for there was no occasion for a premonition.

MONBODDO. If there were no circumstances in the case of *Balcarras* but those mentioned by Lord Pitfour, it proves too much, and therefore proves nothing. I think that *here* the reversion is barred both by the Roman law and ours. *Pacta legis commissoriæ* are unlawful *in pignoribus*; because an usurious stipulation for the pledge is generally more valuable than the sum advanced upon it. But *here* there is a sale, and probably for an adequate price. The premonition, supposing evidence of it, is nothing to the purpose; for redemption was the thing required.

COALSTON. Supposing the lands to have been sold for an adequate price, I have a doubt. The objection of *pactum legis commissoriæ* takes not place in sales. *Here* there was a sale. The provision as to paying annualrents, &c. in the event of a redemption, is no more than a paction *ut res sit inempta*. What strengthens my opinion is, that *here* there was no creditor who could demand his money.

KAIMES. I see the cloven foot: A severe creditor taking the advantage of a needy debtor. This is no more but a security, however expressed.

AUCHINLECK. We are always to consider *quid vere agitur*, not *quid simulate concipitur*. There was no occasion to give the creditor a power of demanding his money; for his interest must have prevented him from ever making the demand.

GARDENSTON. If this is not a sale under reversion, I do not know what definition to give of such a contract. If you find it to be a right in security, you will prevent a good-natured thing, which is often done. A man buys an estate; but allows the seller a term of years to redeem. If he can find money, there is nothing unreasonable in the provision of making up the annual rents: for the purchaser, as is often the case, might chance not to draw his interest out of the subject sold.

PITFOUR. I have always considered that the cardinal difference between a right in security, and a sale under reversion, consists in this,—Whether does the purchaser run the risk of the rents or not? The purchaser is *dominus terræ*; the wadsetter is not. A bargain of risk is implied in the very nature of a sale. How can *he* be any thing else but a creditor who has the interest of his money secured at any rate? How can we believe a fictitious narrative, contrary to the *res gesta*.

MONBODDO. The purchaser was *dominus terræ* till redemption was used: upon redemption *res erat inempta*, and every thing returned to its original condition.

KAIMES. Even in a real sale under redemption matters return to be as at the time of the reversion. Here, if a real sale, the interim rents must have gone to the purchaser; and the risk must have been his in the interim.

BARJARG. The question, whether, from the circumstances of the case, *here* is a sale under reversion, or a wadset? I am satisfied that this was nothing else than a security for money.

KENNET. Many wadsets were granted of old, without the power of calling for the money, because those wadsets were lucrative, and, at the same time, it might distress the wadsetter to have such a demand made on him. That circumstance did not weigh with the Court in the case of *Balcarras: pacta legis commissoriæ* are not absolutely reprobated in our law. But there ought to be a declarator for closing the chequer. In a sale under reversion, the chequer is closed of course when the term elapses. From the circumstances of this case, I think it was *actum et tractatum* that there should be a security only, not a sale.

PRESIDENT. The question comes to this,—Is there here a *pignus* or a sale? The power of requisition to the reverser is not essential. When there is a sale, the price is extinguished; but here just the contrary. I do not value a clause thrown in contrary to law.

On the 6th February 1771, “The Lords found the lands redeemable; adhering to Lord Stonefield’s interlocutor. 8th December 1772, altered upon advising proof, which showed a *fair* sale for a just price.”

1771. February 6. LAUCHLAN DUFF *against* WILLIAM INNES of Sanside.

PREScription.

Quinquennial prescription of the Act 1669, c. 9, pleadable by the cautioner of the tenant.

[*Faculty Collection*, V. 259 ; *Dictionary*, 11,059.]

PITFOUR. The case of the defender does not come either within the words or the spirit of the Act 1695.

MONBODDO. In the case of *Hunter*, 9th July 1765, it was found that an obligation as cautioner for payment of a bond, formerly granted, did not come within the statute.

GARDENSTON. Cautionry is an accessory obligation. How can the debt subsist against the cautioner if prescribed against the principal ?

KENNET. The defence is not good, because the debt is constituted by writ.

KAIMES. I am not satisfied as to that. Will the separate deed of Innes keep the question open as to the tenants ?

HAILES. The defence in this cause has begun at the wrong end. The first thing to be done was to inquire into Lord Caithness's management with his factors and tenants. For ought that we know, Sandside's cautionary obligation may have been at an end, by an actual clearance with the principals. This inquiry was the more necessary, because demands were made against Sandside by the executor of Lord Caithness, which have, in the course of this process, been proved extinguished by writing.

AUCHINLECK. The quinquennial prescription cannot take place here ; for Innes became bound to see the debt paid. Lord Caithness had no farther claim against the tenants.

PRESIDENT. The letter mentioning the sum is expressly conceived as *cautioner*. He did not take upon himself the obligation of the tenants. He is only *subsidiarie* liable in either debt.

On the 6th February 1771, "The Lords repelled the defence on the septennial prescription ; but sustained as to quinquennial prescription. 7th March 1771, adhered."

Act. C. Gordon. *Alt.* D. Armstrong.

Rep. Stonefield.

Diss. As to septennial prescription, Auchinleck, Barjarg.

1771. *February 7.* GILBERT LAURIE and ROBERT HUNTER *against* The DUKE of HAMILTON.

COMMONTY.

A right of servitude over a Commonty not such an interest as can authorise a division upon the statute 1695, c. 38.

[*Faculty Collect. V. 236; Dictionary, Appendix I.; Commonty, No. 2.*]

AUCHINLECK. This is a *new* claim of the feuars, pretending to a right of having commonties divided between the proprietor and one having a servitude, according to valuation. If they have this right, so also has the proprietor. Hence, if a superior should feu out a house and yard, with the pasturage of so many cows, he might restrict the feu to a proportion of the common corresponding to the valuation of his house and yard. This would be absurd. The servitude gives a right to pasture, not to plough; and we cannot transform the right, and, by a division, give the servient tenement more than it was originally possessed of or entitled to.

COALSTON. They who have a right of servitude cannot force a division. If there were only a right of casting peats, this would not give a right of division. A servitude of pasturage is a servitude just as a right of casting peats, though more ample. It is true that the proprietor may insist to set aside a certain share of the surface, such as may be sufficient for the use of the servitude; but that is not the shape of the present process.

On the 7th February 1771, "The Lords found that the feuars who have only servitudes cannot pursue a division on the Act 1695."

Act. W. Nairn. Alt. R. M'Queen.

Reporter, J. Clerk.

1771. *February 14.* CHARLES HOPE WEIR *against* MR ALEXANDER BRUCE.

MEMBER OF PARLIAMENT.

Reduction of a decree of division of valuation, by which a freeholder's qualification was reduced below L.400 Scots, found to be a sufficient ground for striking him off the roll, though he had been upwards of four months enrolled.

(*Faculty Collection, V. 217; Dictionary, 8824.*)

JUSTICE-CLERK. The first objection, that the Court has no jurisdiction by



the statute in this case, is a new construction of the statute, and contrary to justice. By that rule, a man, plainly denuded of his estate by sale, if not struck off by the freeholders, cannot be struck off by this Court. As to the *second* objection; if Mr Bruce is not denuded of the lands, he is divested of the proof of his valuation. He now stands upon an infestment in lands undivided, which cannot entitle to a vote. If the Commissioners do their duty, the alteration ought to be made instantly upon the cess-books.

PRESIDENT. The *first* objection is not *new*; for it has been made and repelled in *Sir George Suttie's* case; in a case from Kinross-shire; and also in a case from Cromarty.

COALSTON. My doubt would have been, were it not for those decisions, how far a *casus improvisus* can be supplied by the Court, while there is a remedy by ordinary action?

MONBODDO. There are four ways by which freeholders may do wrong: 1st, By admitting. 2^d, By refusing to admit. 3^d, By striking off. 4th, By refusing to strike off. This last case is altogether omitted by the statute.

KENNET. There was a doubt as to this formerly; but the extension was not great. If the Court had had no jurisdiction at all in such case, there might have been more difficulty in supplying a clause by analogy. But that was not the case; for the Court had a jurisdiction in the way of ordinary action.

PRESIDENT. The argument was, the statute was beneficial. And the method of determination was convenient. It would be unjust to determine differently in this case from what we have determined formerly in other cases. For parties, trusting to those decisions, have brought summary complaints, and neglected to bring ordinary actions.

KAIMES. I am for extending beneficial statutes: so the Court has done in other cases for a century back. In this we do not go against the spirit of the law; but along with it.

On the 14th February 1771, "The Lords repelled the objection as to competency; found the complaint relevant and proven; and ordained Mr Bruce to be struck off the roll."

Act. W. Baillie. *Alt.* A. Crosbie.

1771. February 14. CAPTAIN BASIL HERON *against* JOHN SIME.

MEMBER OF PARLIAMENT.

Infestment taken in virtue of a clause of union and dispensation in a Crown-charter.

[*Faculty Collection*, V. 219; *Dictionary*, 8684.]

HAILES. Once I had the same doubts as the freeholders; but the judgment of the House of Lords, in the *Forfar* cases, has silenced, if not convinced me.

MONBODDO. I am both silenced and convinced.

PRESIDENT. I wish I was convinced, for then I should think we had done wrong, and the House of Lords right; whereas I still think the contrary: but that judgment shall be a rule to me in all election causes. If the same question occurs in a matter of civil right, I shall then deliver my opinion.

PITFOUR. In the question as to *General Burdens*, the House of Lords altered successive judgments of the Court of Session, and the Court of Session followed the rule laid down by the House of Lords. A judgment pronounced by the supreme court upon a neat point of law, must be followed: it makes law.

On the 4th February 1771, "the Lords, having considered the decision of the House of Lords in the *Forfar* cases, sustained the complaint, and ordered Captain Heron to be added to the roll."

Act. A. Fergusson. Alt. A. Lockhart.

1771. February 14. ALEXANDER COPLAND, of Colliestown, against JOHN BUSHBY.

MEMBER OF PARLIAMENT.

[*Faculty Collection*, V. 221, No. 76, Note; *Dictionary*, 8686, (2d,) Note.]

HAILES. This is the most critical of all objections. When there is a *page second* marked, a *page first* is virtually marked; for *primus est quem nemo præcedit*.

PRESIDENT. This is a good critical answer to a critical objection.

COALSTON. I think this is a better answer,—that the Act of Sederunt 1756 is erroneous: That act ought to be amended.

On the 14th February 1771, "the Lords repelled the objection, and ordered Colliestown to be added to the roll."

N.B. Colliestown craved to be restored to his former place on the roll; but this the Lords would not grant, as he claimed on new titles.

within the *sixty* days, he cannot be in a better situation than other creditors. But that is not the case here. Heritable security was intended from the beginning.

PRESIDENT. If the Act 1696 could have the interpretation put upon it by Messrs Mansfield, I would certainly move for an application to Parliament for its repeal.

On the 15th February 1771, "The Lords assoilyied from the reasons of reduction;" adhering to Lord Kennet's interlocutor.

Act. R. M'Queen. *Alt.* H. Dundas.

Diss. Monboddo.

1771. February 19. JAMES SCOTT against GEORGE STRAITONS.

TACK—

The termination or ish of which was indefinite, being granted to the tenant and his heirs, if effectual against singular successors? Effect of acquiescence in, and homologation of that right.

[*Faculty Collection*, V. 225 ; *Dictionary*, 15,200.]

PRESIDENT. The case of *Belladrum* is not to the purpose; for in that case the tack had ish. Neither is the case of *Lord Hopeton and Wight* to the purpose; for *there* the tacks were excepted from the sale, and in a manner homologated. The question is, whether the tack is good, which has not an ish? It is good against Sir Robert Grahame and his heirs, but the pursuer says that *he* is a singular successor. Answer: He has homologated the right by taking payment of rent, and even of vicarage, for near a century. I also think there is a good plea of prescription here. No infestment was necessary in the case of patronages. Possession has been held sufficient to give a right, because infestment does not commonly follow upon patronage. *Here* also is a subject upon which infestment does not generally follow.

KAIMES. I doubt as to prescription, but I am clear as to homologation.

MONBODDO. I never heard of a right like this. I do not think it a tack at all; there is not so much as a mutual contract; for the tenant might renounce his possession at pleasure. It is, however, binding on the granter and his heirs, anomalous as it is. As to singular successors, the case is different. Records secure singular successors, except as to tacks, which are provided for by the statute 1449. Now this tack is not in the form of the tacks mentioned in the statute 1449: it is not *for terms*; it is but going one step further to make a tack good without any prestation of rent. I do not see any homologation. The receipts are cautiously worded, for *occupation of land*. Neither do I see how prescription can take place here. Patronages are not just in the case of the statute 1617, but approach near to it. The

tack. If they who resided in the country, or passed through it, heard of this extraordinary right, how is it possible to say that the heritor himself knew nothing of the matter?

JUSTICE-CLERK. An ish to a tack is not necessary: so it was determined in the case of *Holmains*. It will be good against the granter and his heirs. Tacks to perpetuity, and for 1000 years, are equiparate. So long a homologation upon the part of the singular successor puts this pursuer in the same state as if he were the heir of the original granter. The law does not require so exact a correspondence between the two parts of the contract *locati conducti*. A master may have the power of resuming his land; and yet the tenant may be bound to hold it, and so *vice versa*. There is no danger to singular successors, for they may challenge *tempestive*, instead of acquiescing for a century.

KENNET. I should be sorry that tacks without an ish, or of an immoderate endurance, should be good against singular successors: but we are relieved of this difficulty by the plea of homologation, which I think is good.

PITFOUR. Such a tack is good against heirs, not against singular successors. In the case of *Belladrum*, the House of Lords did not mean to determine the contrary. This lease was not *collatum in tempus indebitum*. The prorogation was running in 1681: this is my idea, which has been now fully supported and confirmed by a disquisition of one of my brethren. In 1681 the singular successor might have insisted to void the lease: now he is bound both by homologation and prescription.

On the 19th February 1771, the Lords sustained the defences, and assoilyied. 8th March 1771, adhered.

Act. J. Scott. Alt. A. Wight.

Reporter, Pitfour.

Diss. Monboddo. [This judgment agreeable to the opinion of Coalston, who was absent.]

Affirmed on appeal.

1771. February 20. ANDREW ROSS and OTHERS against JOHN GLASFORD and COMPANY.

CHARTER PARTY—MUTUAL CONTRACT.

A vessel on a trading voyage being captured, the sailors entitled to wages *pro rata itineris*.

[*Faculty Collection*, V. 239; *Dictionary*, 9177.]

AUCHINLECK. It is not agreeable to equity to deprive a workman of his wages. Here, properly speaking, there were three different voyages to Newfoundland, Lisbon, and Glasgow. Shall the accident of a loss on the *third* voyage deprive them of their wages on the other two? Suppose the ship had been

fully loaded to Newfoundland as well as to Lisbon, and that it had returned to Clyde from Lisbon with two hogsheads of wine, would a capture, in such circumstances, have deprived the crew of all claim for wages?

PITFOUR. I have, for near 40 years past, held the decision in the case of *Lutwicke* to be sterling, and agreeable to the principles of the contract *locati conducti*. This case is still stronger; for *there* only one voyage cut off in the middle, *here* two or three voyages. I do not know the distinction between *law* and *equity*, especially in mercantile law. Our neighbours in England have distinctions between law and equity. I shall not inquire how far they are gainers by that. A debt due by former voyages cannot be annulled in consequence of the after loss of the ship. A statute to the contrary would convince me; for then I would say, let the fault lie on the statute, not on me.

KAIMES. Equity is out of the question here, for the owners were losers. I consider all this as one voyage.

GARDENSTON. Were the merchants of Glasgow to prevail, no sailor in his right wits would ever serve them in the time of war. Here are three distinct voyages;—there is a profit at first, why should the sailors be the only losers?

HAILES. The maxim that *freight is the mother of wages* applies to this case. There was a freight between Newfoundland and Lisbon: nay, more, there were considerable profits, though the defenders conceal them by a fallacious account, laying the *whole* charge of outfitting upon that *single* voyage. The judgments of Lord Chief-Justice Holt are very strong. Some of the witnesses mention express bargains with sailors, which shows that this question will not be a precedent, one way or other; and it is remarkable that the most eminent merchants in Glasgow give their opinion *in thesi* for the sailors: so that there is, at most, a local custom unsupported by general usage or precedents.

JUSTICE-CLERK. Here we have, on the side of the sailors, the opinion of many respectable marchants,—the opinion of writers on public law,—the judgment of all Courts, inferior and supreme: if any erroneous practice has crept into the Clyde, it is high time to correct it.

PRESIDENT. I was afraid of myself. I suspected that I might be prejudiced, both from my consideration for seafaring men, and from the accuracy of the petition: no practice would ever move me against what is obviously equitable. The merchants differ. I will lean to the *humanior sententia*. The case of *Lutwicke* was wrong judged here; but the House of Lords put this Court right. Altering this interlocutor will do infinite service to the trade of Glasgow. I observe that there have sometimes been special bargains: this proves the rule of law to be as I apprehend it.

On the 20th February 1771, “The Lords found wages due for the voyage to Newfoundland and Lisbon, with interest *nomine damni*, and expenses;” altering Lord Kaimes’s interlocutor.

Act. W. Craig. *Alt.* A. Wight.

[Coalston, who was absent, much approved of this interlocutor. He told me, that it was a cause where no one but a lawyer could go wrong; and he observed, that Lord Kaimes, at first, was in the right, but, by reason of law notions, went wrong by degrees till his interlocutor became indefensible.]

1771. February 20. MRS JEAN KERR against The EARL of HOME.

FOREIGN.

Triennial Prescription applies to Debts contracted in England.

[*Faculty Collection*, V. 234; *Dictionary*, 4522.]

GARDENSTON. The *locus contractus* limits the constitution and endurance of a debt, if the parties continue to live in the *locus contractus*: the case is different when the debtor transfers his *forum*. A promissory-note, once extinguished in England, cannot be revived by an action in Scotland. The case of *Innes* depended on this, that the debtor came into this country, and hence the creditor was obliged *sequi forum rei*.

PRESIDENT. If you sue *here*, the Court must attend to its own law; but, if a decree is once taken in England, there the Court will interpose *ex comitate*, and make it effectual in Scotland.

PITFOUR. The debt is contracted in England, but we must follow our own law.

KAIMES. The statute of limitations affords an exception against payment. If, afterwards, a man pursues *here*, I will presume payment, because he did not pursue sooner. If the debtor came to Scotland, and lived three years there, I will hold the triennial prescription good, because it was the business of the creditor to follow him.

AUCHINLECK. All questions concerning foreign law are difficult. When a contract is entered into in a foreign country, it is presumed to have been agreeable to the laws of that country, yet it is binding all over the world. When a man contracts a personal debt in England, which is not good against the heir, the creditor may make the best of it wherever he can find the debtor's estate, and thus the heritable estate, situated in Scotland, may be affected. When a creditor pursues in another country, he must subsume that there is a subsisting debt, by the law of the country. We cannot make the Earl of Home liable, as heir, by our law, and yet deprive him of a defence by our law. The pursuer does not instruct, *scripto*, that a rent is due. A tack is proved *scripto*, but nothing more.

MONBODDO. This is a question of the law of nations. The constitution and defeasance of the obligation must be tried by that law. If the obligation is valid by the law of England, the pursuer must have the benefit of the law of England. *It is* subsisting by the law of England. In the case of *Randall* against *Innes*, the principle was, that the creditor had neglected to pursue a debtor who had resided in Scotland more than three years. As to Lord Auchinleck's objection with respect to the heir being bound, *that* relates merely to the *execution* of the contract, and it must be decided according to the place where execution is sued for.

PRESIDENT. The present Lord Home has always resided in Scotland,—*he* is the defender,—*this* assimilates the present case to that of Innes. The action against the Dowager Lady Home can never interrupt the prescription.

JUSTICE-CLERK. I cannot distinguish this case from the case of *Innes*. It is the same thing whether the pursuer, contracting the debt, or his heir, is pursued. *Here* the defender has always resided in Scotland: it was the business of the creditor to look after the debtor. Both the late Earl of Home and the present, had a *forum* for prosecution in this country: Why make the heir liable *here*, though not liable in England, and yet not allow him a defence by the law *here*? Both Sande and Huber are clear as to this question. Both are great authorities: the last, in particular, gives his judgment with much precision.

On the 20th February 1771, the Lords sustained the defence, “and assolied.”

Act. R. M'Queen. *Alt.* D. Rae.

Reporter, Justice-Clerk.

Diss. Monboddo.

1771. January 29. PHILIP MILLER *against* FRANCIS ANGELO TREMAMONDO.

PROOF.

A promise, though alleged to be made *intuitu matrimonii*, not Proveable by Witnesses.

[*Faculty Collection*, V. 211; *Dictionary*, 12,395.]

GARDENSTON. No decision says that the articles of a marriage-contract may be proved by witnesses.

PITFOUR. I do not approve of a proof before answer in this case. It is the relevancy of facts, not the competency of the mean proof, that is left undetermined by a proof before answer. Ever since the Court of Session was established, and juries were disused in civil cases, no promise is probable by witnesses, unless it is part of a common contract. A marriage-contract is no common contract, nor is it probable by witnesses.

AUCHINLECK. It is true that a marriage-contract is not one of the common contracts, such as that of buying and selling, (though that too is often at the bottom.) Yet marriage itself is probable, by witnesses, showing antecedent communings and the like. Why not prove communings as to prestations concerning marriage?

KENNET. It is dangerous to receive witnesses *here*; for, by the same rule, witnesses must be received in every case where marriage is entered into without a contract.

KAIMES. How is it in our power to make a distinction between this case

and every other case where there is a marriage-contract not reduced into writing.

PRESIDENT. Provisions and jointures are not probable by witnesses ; but it is a different case where moveables are promised, such as the *jocalia* in the Roman law. Among country people, a cow, a chest, a bedding of clothes, are promised with the bride. Such promises are never committed to writing ; would they not be probable by witnesses ?

BARJARG. The demand was not made by Miller, the pursuer, *ex incontinenti*, but *ex intervallo*. [This is a mistake in fact.]

PITFOUR. Here is an alleged obligation to furnish a house, and give a share of moveables. Such obligations are frequent in formal marriage-contracts.

MONBODDO. I think that contracts may be proved by witnesses. I do not know that marriage-contracts are an exception. *Here were pacta dotalia* concerning moveables of no great value : There are no provisions or jointure sought to be proved.

On the 29th January 1771, "the Lords found a proof not competent by witnesses ;" altering Lord Monboddo's interlocutor. 26th February 1771, *adhere*.

Act. H. Dundas. *Alt.* H. Erskine.

Diss. as to snuff-box, rings, and laces,—Auchinleck, Barjarg, Hailes, Monboddo, President.

1771. *February 26.* COALSTON. The argument for the defender proves too much. That a proof by witnesses is competent, is the general rule ; but there are cases excepted. This case of *pactum dotale* is not excepted. The Court seems to have adopted a new exception. The important contract of matrimony itself may be proved by witnesses : why not its accessories also ?

PITFOUR. It would be dangerous to alter this interlocutor. I am surprised to see the law of the Romans quoted : they had their solemn stipulations, which they held as sufficient proof. With us a *pactum dotale* is commonly committed to writing. In bargains about moveables witnesses are admitted ; because, *there*, there is an obligation *ultra citraque an contractus nominatus* ; but here there is a mere gratuitous promise. If you allow a proof to the extent of L.50, why not to the extent of L.5000. This Court has been always narrowing a proof by witnesses : hence perjury is prevented more with us than in some other countries.

MONBODDO. All bargains concerning moveables may be proved by witnesses. Heritable subjects, by reason of their value, cannot. Even in heritable subjects witnesses may sometimes be admitted,—as in a tack for a year, and in a sale of lands, *ubi res non est integra* : this resembles the present question : *Res non est integra* : marriage has followed. L.50 in presents with a wife is no great matter. Many people have got fifty times as much with a wife and made a bad bargain. If, here, any stipulation for a jointure, &c. were alleged, the case might be different, as respecting matters having *tractum futuri temporis*. Among country people bargains of this nature are usual.

KAIMES. Adhering can do no harm : altering may. Writing is now so common that access may be had to it in every place, unless upon the top of some Highland mountain. It is remarkable that our law has, by degrees, required writing where it did not formerly ; and this has been required by the Supreme Courts, while the inferior courts continued to admit of witnesses. Witnesses are allowed in criminal cases, because writing cannot be had.

JUSTICE-CLERK. Miller has not observed the law of the land. If he suffers, no help for it. This is not an exception from the general rule. Mere promises are not probable by witnesses though bargains are. The marriage here was concluded by consent of parties before any mention was made of the promises libelled. By the same arguments which the pursuer uses, why may not a claim be reared up, after many years, by the wife, for one half or for the whole of the moveables.

BARJARG. It is only by a proof that we can know whether the promises were connected with the marriage or not.

HAILES. If you put a *close bed* instead of a *snuff-box*, a pair of *blankets* instead of *laces*, you will find that here is a sort of covenant or promise universally prevalent among country people. We do not hear of actions for the implement of such promises, because they are publicly made ; and the parties concerned imagine that they may be fixed down by witnesses. But, if you once find that they are not probable by witnesses, the parents who make such promises will be too apt to draw back. If perjury is excluded one way, a door will be opened for it the other way ; and the party will be as apt to swear falsely as witnesses are.

COALSTON. With people of condition the practice is universal to reduce marriage-contracts into writing. Not so among the lower sort. I would limit the proof by witnesses to the *ipsa corpora* of moveables. Anciently such *pactum dotale* might have been proved by witnesses. There is no decision to the contrary. Why extend the law when we know not how deep it may strike ?

PITFOUR. I do not imagine that a *pactum dotale* was ever probable by witnesses with us, unless when we had no writing. "The longest liver bruiks all," is a common rule among country people ; and yet no one ever heard that any Court would allow this to be proved by witnesses.

PRESIDENT. I do not see the dangers apprehended by allowing a proof by witnesses. Evidence by witnesses is often admitted *now*, which would not have been admitted *formerly* ; for relevancy is left undetermined. Those parts of a contract which are generally committed to writing, and relate to a future period, ought not to be proved by witnesses. *Here* there is no such thing. An alleged promise of a snuff-box, or of a ring,—*that* will not go to solemn prestations. The promises are not gratuitous but *intuitu matrimonii*. In Edinburgh, and on this occasion, there was *copia peritorum* : but the same rule must take place in the country. Must a writer be sent for to authenticate every promise of half a dozen Highland cows, or a score of sheep ? The cost would exceed the subject. Forty witnesses are present at the promise, and yet all this must go for nothing. And the father will be allowed to say, "I know nothing of the matter. My promise, which you allege, is not probable by witnesses."

KAIMES. If you can confine the question to the present fact, good ; but, if you open a door, how can you shut it ?

PRESIDENT. I do confine the question to the *ipsa corpora* of moveables. I do not extend it to matters having *tractum futuri temporis*.

ELLIOCK. We do not hear of any actions for implementing such prestations among country people. This shows the general opinion that such prestations are not probable by witnesses.

AUCHINLECK. This rather shows that there is no such opinion ; and that no man disputes the payment of an obligation where witnesses are ready to check him.

On the 26th February 1771, "The Lords found the promises libelled not probable by witnesses ;" adhering to their former interlocutor.

Act. J. Boswell, H. Dundas. *Alt.* H. Erskine.

Diss. Coalston, Gardenston, Auchinleck, Barjarg, Hailes, Monboddo, President.

Miller did not reclaim. He told his counsel that he would not give the Court any farther trouble ; and, at the same time, declared that he would not put his father-in-law upon oath, lest he should perjure himself.

1771. February 26. CHARLES INGLIS *against* SIR ROBERT ANSTRUTHER, &c.

WARRANTICE:

Incurred only by Eviction.

[*Fac. Coll.*, V. 243 ; *Dictionary*, 16,633.]

PRESIDENT. The Extract of the Decree Absolvitor is a valuable book in Mr Inglis's library. I should think that he might have been satisfied to pay the expense of it. His argument goes upon this,—that the decision of this Court was scarcely just ; and that the House of Lords affirmed it from the deference due to this Court in matters respecting its own officers. This is a strange plea for Mr Inglis to make, and is not very decent with respect to either Court.

COALSTON. If Waddel had prevailed, damages would have been due ; but he did not prevail, and no eviction has happened. The question,—how far expenses due ? There was a conditional obligation in case of eviction. But, as there was no eviction, there was nothing exigible. *L. 18, Cod. de Evict.* The effect of an instrument, notifying distress, is only to exclude the person warranting from the objection of collusion.

KAIMES. Unless there is eviction, there is no warrantice.

MONBODDO. An obligation to warrant a subject does not imply an obligation to pay every expense incurred in defending the subject.

On the 26th February 1771, "The Lords dismissed the process; assoilyied, and found expense of extract due."

Act. R. M^cQueen. *Alt.* D. Grahame.

Reporter, Kennet.

1771. *January 25, and March 7.* WILLIAM OGILVY *against* DAVID ROSS, &c.

PERICULUM.

A at London sent a cask to B at Edinburgh, addressed "to B. Esq., by the ship Adolphus, Ross, master." The master, upon his arrival at Leith, lodged the cask with a warehouseman, who, being unable to discover B by the above address, kept the goods till they were spoiled. No bill of lading or receipt was transmitted by A to B, nor did he send notice that the goods were to be shipped. In an action against the master and the warehouseman; found that neither of them was liable for the loss.

[*Dictionary*, 10,099.]

GARDENSTON. This is a question of very great importance in a very small cause. I distinguish the case of the shipmaster from that of the warehouse-keeper. I am clear that the foreign merchant ought to give notice to the merchant here, that he may be on the watch to receive the goods on their arrival. The shipmaster is bound to transport the goods, and to deliver them when called for. It is not practicable for him to seek out the persons interested in the goods, nor is he bound so to do. All that he can do, is to lodge them in some cellar till they be called for. It is another thing, if it appear, from the proof, that the master or his mate denied that they had the goods, or refused to deliver them: in such case damage would be due. But here it is probable that no demand was made for the goods at the arrival of the ship. As to the owner of the warehouse, a different duty is incumbent upon him: if we suppose that he is not bound to make inquiry about the owner of the goods, the goods would remain undiscovered.

AUCHINLECK. The shipmaster was not bound to send about inquiring where Ogilvy lived. There was no sufficient inquiry made at the shipmaster by Ogilvy; no bill of lading was produced to him, nor was there any evidence of the authority by which he was questioned. As to the owner of the warehouse, the case is more difficult. If Ogilvy had lived at a great distance, he was not bound to inquire after him, nor did he know that there was *periculum in mora*; for there was no mention made of apples on the direction of the cask.

PITFOUR. I think, for the reasons already given, that the warehouse-keeper is liable. If those people do not know their duty, it is high time for us to teach it them.

HAILES. Concur in the opinion given as to the shipmaster. I do not.

see that he could do more, or was bound to do more, than he did. As to the warehouseman, I understand that, in practice, all that is understood as required of him, is simple custody, for which he receives a small cellar-rent. Most people who have had occasion to get goods from London, know that they sometimes remain long in the custody of warehousemen without any inquiry made : those warehousemen are sometimes blamed for putting goods into their cellars too precipitately ; but I never heard that they were liable in any diligence beyond that of custody.

COALSTON. The whole confusion arises from the original neglect in not taking a bill of loading or receipt. I would assoilyie the shipmaster. I doubt as to finding the warehouseman liable : he probably did not know Mr Ogilvy : why should he have advertised goods, which were by that time, perhaps, not worth the expense of advertising.

JUSTICE-CLERK. I think that the apples were demanded at the time of the shipmaster's arrival ; but still I think he is not liable in damages. He did not fail in his duty, nor did he refuse to deliver the cask to any person authorised to receive it. But the warehouse-keeper is liable, for he is the servant of the public, and has been careless : he is guilty of a *lata culpa* as *negotiorum gestor*.

PRESIDENT. I would assoilyie the shipmaster, and find the warehouse-keeper liable : he is precisely a *negotiorum gestor*. By the smell, he must have known that apples, a perishable commodity, were contained in the cask. Could he show that he had taken any measures for discovering Ogilvy, my opinion might be different ; but nothing of this nature occurs here.

On the 25th January 1771, the Lords "found the warehouse-keeper liable, but assoilyied the shipmaster, and found no expenses due but expenses of extract ;" altering Lord Elliock's interlocutor, (who had found shipmaster liable, and expenses due.) *Vide* 7th March 1771.

Act. P. Murray. *Alt.* G. Buchan, Hepburn.

Diss. as to the warehouseman, Coalston, Hailes.

A petition was presented, on advising which, with answers, the following opinions were delivered :—

March 7.—COALSTON. The pursuer supposes that the defender was a *negotiorum gestor*, or one who had the custody of waif goods. He is nothing else but a depositary, bound to hold the goods till they are called for, and then properly proved. He is just in the same situation as the shipmaster, before the goods are deposited with the warehouseman. Nothing is more necessary than this idea of the nature and extent of his duty in the ordinary course of commerce. Unless where parties are supinely negligent, the bill of loading will prevent any mistake or difficulty in ascertaining property. If an intimation be required from the warehouseman, *Where* is he to intimate, *how*, and at *whose* expense ?

PITFOUR. It was vain for the warehouseman to keep the goods which he saw were perishing : he ought to have advertised them. The apples were lost by his supine neglect, and he must be answerable.

JUSTICE-CLERK. The warehouseman was a public custodiar, who receives a hire, and is bound *præstare diligentiam*.

AFFLECK. I was formerly of the same opinion; but Lord Coalston's argument now seems unanswerable. Why should the custodiar take the burden of seeking out the person whose goods are put into his hands?

BARJARG. It is the duty of the custodiar *præstare summam diligentiam*; but then it is the diligence of custody. If he keeps books whereby every one may discover his own, nothing more is required.

PRESIDENT. I was for the interlocutor; but now I see cause to alter.

ELLIOCK. I pronounced the original interlocutor; but now I am convinced that it was erroneous.

On the 7th March 1771, "The Lords assoilyied;" altering the interlocutor of the Inner House, and that of Lord Elliock.

Act. P. Murray. *Alt.* J. Boswell.

Diss. Justice-Clerk, Pitfour. Kaimes did not vote.

1771. January 25. ALEXANDER GREIG *against* WILLIAM GREEN.

PROMISSORY-NOTE.

Action of Recourse not competent against the indorser of a Promissory-Note.

[*Fac. Coll. V.* 209; *Dict.* 12,259.]

GARDENSTON. The Court has long ago got over what I considered the great difficulty, the finding promissory-notes valid, though informal; and yet it has persisted uniformly in giving them no farther privileges.

MONBODDO. A great lawyer in a neighbouring country, (Lord Mansfield,) observes, that the practice of merchants may become part of the common law. I see no reason for stopping. Since we have gone so far already in granting privileges to promissory-notes, I cannot draw the line here.

AUCHINLECK. Merchants found it convenient to introduce promissory-notes: one reason was, because many of their creditors could not write, and consequently could not draw bills; another, that promissory-notes are made to bear interest, which bills cannot regularly do. Promissory-notes are found valid, that men may not be suffered to counteract their own obligations; but it would be going much further to give them extraordinary privileges: This would be not only creating obligations contrary to decisions, but also creating obligations in which the indorser did not consider himself as originally bound.

ELLIOCK. I think it is not in the power of the Court to communicate the privileges of bills to promissory-notes.

JUSTICE-CLERK. There is no higher privilege belonging to bills of exchange

than this of a certain form in negotiating them : it is adverse to the common law to extend such privileges.

KAIMES. Promissory-notes were current in England long before the statute authorising them. This is a proof of the integrity of that nation : the same practice may hereafter prevail in Scotland, but hitherto there is no evidence of its so prevailing as to require our decision in support of it.

COALSTON. Promissory-notes are more used than bills of exchange, and they are generally considered as implying recourse as much as bills. I do not comprehend why the Court stopt short, after it allowed promissory-notes to be indorsed ; the doing so much, and doing no more, is apt to ensnare the lieges. I am deeply sensible of the many decisions of the Court against the privileges of promissory-notes ; but I do not know that this precise case, as to recourse, has ever been determined.

PITFOUR. In England we see the source of the practice in statutes : not so with us.

PRESIDENT. Although a statute should be obtained, equalling promissory-notes to bills of exchange, yet many questions will remain to be determined as to the operation of those notes in time past : it is dangerous to determine that, as to such questions, the law of England must be the rule all our decisions notwithstanding.

On the 25th January, 1771, the Lords sustained the defence.

Act. A. Gordon, junior. *Alt.* T. Ferguson. *Reporter*, Coalston.

Diss. Monboddoo, Coalston. [He was for inquiring into practice.]

1771. *March 7.*—**AUCHINLECK.** The certificates from merchants are highly improper : they might just as well have certified that a charge of horning could pass on a promissory-note.

COALSTON. The practice of merchants makes law in mercantile matters : had we evidence of a long and general practice, it would go far. From practice, promissory-notes of banking companies are held good though wanting legal solemnities. By practice also, indorsations of promissory-notes have been sustained. Would take trial of practice as to recourse on promissory-notes.

PITFOUR. If this had happened in 1696, there would have been no occasion for the statute : the merchants would have made law. I do not know *who* are the members of this parliament of merchants, or *how* we are to collect their voices. It has been found that, *in re mercatoria*, the solemnities of the Act 1681 are not necessary : the older Judges, Newhall and Dun, scrupled at first to come into this opinion : it may be fit to go further, and to establish recourse by statute on promissory-notes. This the Legislature may do : we cannot.

MONBODDO. Practice may introduce rules in promissory-notes as well as in bills. It is now a general practice to grant promissory-notes instead of bills. The practice of merchants will make law.

KAIMES. No practice is proved. We have only an opinion indecently given

to influence this Court. Bills of exchange were circulated in England, while there was no law for them. At that time they passed among merchants, and yet courts of justice could not regard them.

ELLIOCK. The interlocutor is right. The privileges of bills of exchange are known; they are adopted all over the world. Promissory-notes are not universally received in practice, particularly not in Holland. With us, very lately, they were not so much as considered to be documents of debt. In England the authority is given them by degrees. The first statute to that effect was temporary. The opinion of merchants will not make law. If I give a bank-note out of my hand, and the bank does not pay, will there lie recourse against me?

JUSTICE-CLERK. In a matter of law, I must judge according to my own opinion of law. This decision may affect the interest of many individuals, but I do not see the necessity of promissory-notes. A decision of the Court, checking that practice, would be of public utility. Why allow merchants to grant promissory-notes instead of bills? In England the case is very different, because promissory-notes and bills are upon the same footing. If merchants, for their own conveniency, will grant promissory-notes, they may add *with recourse*, and then they will be bound with their own covenant.

PRESIDENT. If this had been a universal practice, we should have had another sort of opinion.

On the 7th March 1771, "the Lords advocated the cause, sustained the defence, and assoilyied;" adhering to their interlocutor of 25th January 1771.

Act. A. Gordon, jun. *Alt.* G. Fergusson.

Reporter, Coalston.

Diss. Monboddo, Coalston, (who was for inquiring further into practice.)

1771. June 13. DAVID GRAY *against* ROBERT REID.

JURISDICTION.

Jurisdiction, Act 20th Geo. II., c. 43. Burgh of Barony of Kilmarnock, If independent of the Baron?

[*Fac. Coll.* V. 266; *Dict.* 7685.]

MONBODDO. As to the jurisdiction of a burgh, it matters not *who* is the superior, providing the jurisdiction is independent.

KAIMES. I am of the same opinion, and am glad to be so, as it is of great moment that large societies of men have the means of action within the place of their residence.

PRESIDENT. At first I doubted, because of the words of a statute, which I greatly esteem. The words of the statute are strong, but I think they relate

not to this case. If the superior does not name magistrates, the community has the power of naming; so that there seems an inherent jurisdiction in the community. Such is the case in the *Burgh of Wick*, and such, in part, in the *Burgh of Aberbrothock*. There is a difference between the interference of a baron and a right created in favour of a baron.

JUSTICE-CLERK. The baron cannot recal the exercise of the jurisdiction, or change the bailies named. The statute relates to a jurisdiction momentarily in the baron, and revocable every hour, whereby the exercise of the jurisdiction and the existence of the judge depended on the baron's pleasure. It was this unlimited and arbitrary power which the statute wisely abolished.

On the 13th June 1771, the Lords found that the community of the burgh of barony of Kilmarnock, and the jurisdiction belonging to the magistrates thereof, is "independent of the baron, and therefore repelled the reasons of suspension;" adhering to Lord Auchinleck's interlocutor.

Act. J. Boswell. Alt. D. Dalrymple.

1771. June 21. MRS MARGARET PORTERFIELD *against* HOUSTON STEWART NICHOLSON, Esq.

WITNESS—OBJECTION OF RELATIONSHIP—AGENCY.

[*Faculty Collection*, 160; *Dictionary*, 16,770.]

MONBODDO. Modern practice has so much relaxed the severity of objections to witnesses, that I am not sure how the law now stands. *Lady Maxwell* naturally took a share in the inquiry as to this affair: she ought not to have been called as a witness, both on account of relation, which is a good objection when there is no penury, and also on account of her acting as agent. She acted as an agent, and even improperly in that character, for she took down in writing what the witnesses said, and read it over to them, and asked them if they could stand to it. This was equal to a precognition, and was in a manner tying down the witnesses to adhere upon oath to their declarations.

GARDENSTON. Lady Maxwell was no agent; she only reported what she had heard or knew.

BARJARG. There is no *penuria testium*. The objection on account of acting as an agent is strong.

PRESIDENT. Many witnesses may have been examined in this cause; but there is an exceeding *penuria testium* as to the only fact wherein Lady Maxwell's evidence is desired.

KAIMES. I would reserve the question as to Lady Maxwell's oath to the end of the cause, so that the question may be tried without it, and then we may see whether there is any occasion for it.

JUSTICE-CLERK. The objection, on account of relation, is generally good;

but cases occur where necessity must get the better of the objection. From the number of witnesses, no proof arises that there is not a *penuria* as to a particular fact. Many of the witnesses may know nothing of this crime, in its own nature most occult. The examination sought, is now restricted to a fact, which, if not proved by Lady Maxwell, cannot be proved at all. As to her having been an agent, perhaps there were improprieties in her conduct, but not enough to set her aside altogether.

PRESIDENT. The objection of *relation* is nothing, because the fact sought to be proved by her depends altogether upon her testimony. *Proditio testimonii* nothing, because she spoke of it to the defender's father. As to the objection of *Agent*, it is the only material one. It was natural for Lady Maxwell to be intrusted in the inquiry concerning a fact said to have happened under her own roof. The inquiry commenced in presence of the defender's aunt. There lies no objection to her taking down, in writing, what the witnesses said, and reading it to them. This was necessary, in order to come at the truth: *interest reipublicæ ne crimina maneant impunita*.

PITFOUR. The objection flies off when the examination is restricted to the fact, already mentioned in Miss Henderson's oath.

On the 21st June 1771, "the Lords allowed Lady Maxwell to be examined as to the fact in Miss Henderson's oath, reserving all exceptions to her credibility; and remitted with this instruction to the commissaries."

Act. A. Lockhart, *Advocate.* *Alt.* J. Swinton, H. Dundas.

Reporter, Kennet.

Diss. Stonefield, Monboddo.

Non liquet, Kaimes.

1771. June 27. CHARLES HOPE VERE, Esq. *against* MR ALEXANDER BRUCE.

MEMBER OF PARLIAMENT.

Reduction of a decree of division of valuation, by which a freeholder's qualification was reduced below L.400 Scots, found to be a sufficient ground for striking him off the roll, though he had been upwards of four months enrolled.

[*Faculty Collection, V. p. 217; Dictionary, 8824.*]

MONBODDO. I have no doubt as to the merits. I would doubt of the competency were it not for judgments pronounced by this Court. It is plain that this special case has been omitted in the statute. Neither are there any general words which give us jurisdiction to supply the omission. Nevertheless, I would go on in the error until we are corrected by superior authority.

ALEMORE. I doubt how far we are tied down by precedents, when we are satisfied that they have interpreted the statute beyond its purview.

On the 27th June 1771, "the Lords ordained the name of Mr Bruce to be expunged;" adhering to interlocutor 14th February 1771.

Act. R. M^cQueen. Alt. D. Rae.

1771. June 27. JOHN SINCLAIR of Freswick against SIR JOHN SINCLAIR of May.

PREScription—TEINDS.

An heritable right to Teinds, not acquired by the Positive Prescription by possession upon tacks only.

[*Fac. Col. V. 269; Dict. 10,836.*]

KAIMES. I am not fond of the precept of *clare constat*, 1662; it bears a rasure, vitiation, or superinduction: but I must not determine merely on my liking or disliking. It is certain that the Bishop of Caithness was not titular: we are not to presume that he would confer a right which he had not. The sense of the precept, when freed of the superinduction, is thus:—"I give you such *decimæ garbales* as are *inclusæ et nunquam separatæ*." It lies upon the holder of the precept to show that more was understood. I do not see possession upon the precept 1662: The very idea of possessing upon it, was relinquished till the means of proving the contrary was cut off. I doubt of prescription at any rate: the estate was sold in 1694, upon the supposition that there was no right to the teinds. The apprisings containing a right to the teinds were not the cardinal rights of the estate.

AUCHINLECK. I thought possession was very dark, but I had a bias for the proprietor against the titular. Now we are relieved. The exception of Byreland-lorne is plainly a superinduction. The most I can do for a vitiated deed, is to hold the superinduction *pro non adjecto*, and when I do so, I see no difficulty in the clause, which Lord Kaimes has rightly explained; at any rate, I see no possession.

HAILES. I see the force of the argument for this interpretation of the precept 1662. I cannot explain it in another sense, when the after conduct of parties is considered: if the clause, without the manifest superinduction, could not aid May. I cannot allow him to draw an argument for the superinduction in his own favour; this would be allowing a party to profit by the defect in the deed on which he claims. The sale 1694 satisfies me that the parties concerned either conceived the precept 1662 as insufficient for the purpose of establishing an heritable right to the teinds, or otherways informal; for the teinds, in 1694, were supposed not to have belonged to May. I have no doubt that the sale 1694 was held to be the cardinal right on which the family of May continued to possess, for it was a much better right than the collateral claspers of adjudication. But what puts the matter beyond doubt with me, is the

conduct of Sir James Sinclair. In all the various processes, he never so much as insinuated any heritable right. On the contrary, he pleaded on a tack of teinds, and a prorogation of the possession thereon *per tacitam relocationem*. So late as 1722, he expressly averred, that the tack had been produced by him, and borrowed up by his doer, John Dowall, then alive. Can I believe that his right was heritable, when he himself averred it to be temporary? or, can I suppose that he changed the *causa possessionis* when he himself affirmed he had not?

MONBODDO. I am clear of opinion to adhere. *Here* is a good title of possession as proprietor. As to this vitiation of which so much is said, were it by the person to whom the precept was granted, I would give the deed no credit; but the clause is stronger in his favour without the exception superinduced, so that is of no benefit to the grantee. In matters of prescription, *nemo potest mutare causam possessionis suæ* does not apply as to the prescriptibility of parsonage teinds. Had the parson continued parson, I should think them not prescriptible; but the teinds went out of the beneficed person in 1618, by reason of the decreet of modification, which rendered him a stipendiary.

ALEMORE. Parsonage teinds were not prescriptible till 1693. The teinds of the regular clergy were soon carried off, but the teinds of the secular clergy were never taken off from the church. I do not think that the modification in 1618 is of any consequence: In those days the patron, when he presented, took care to secure himself in a tack of teinds from the presentee, at an elusory tack-duty; this made it necessary to allow an augmentation to parsons thus deprived of the means of living: Nevertheless, the titularity was not thereby destroyed. The parson, at the expiry of the tack, had still the right of the teinds in him; for, if *he* had not, *who* had? Thus matters continued till 1693. The construction put upon the precept is improbable: the Bishop could not truly say that the teinds were *decimæ inclusæ*. I see a vitiation. I do the deed no injury, when I suppose that it is agreeable to truth. Here, then, is no title, neither is there possession. Supposing a title, May has ascribed his possession to a tack: Must Freswich, at this distance of time, bring a proof that May acted properly? Or, can May say, "I have told you a story for 30 years together, I did *not* possess upon the tack: prescription on an heritable right has now run, and *you* must prove possession of the tack."

PITFOUR. Were all statutes but one to be abolished, the statute 1617 would probably be the *one* preserved. The question is not, Whether 40 years can secure the lieges? but, Whether 500 years can? for, if you lay aside the statute 1617, 500 years are as unavoidable as 40. No inquiry as to the legality of the right is competent after possession for 40 years, upon a proper title of prescription. The rules of the canon law, nothing: our own acts of annexation are stronger than the canon law; and yet possession upon a title will be good against them. A conveyance by a minor would be good after 40 years. The rule—*quod nemo potest mutare causam possessionis*, is just as long as the *causa possessionis* is *ens reale*. A wadset right, engrossed in a letter of wadset, is good, as long as the wadsetter has occasion to use it; but, if he has once taken a charter and infestment from another, *that*, with 40 years' possession, will be good against the reverser in an action of reduction and improbation. Prescription is the transmissibility of an unlawful right by a lawful way. To suppose an

original *bona fides* is incongruous. An alteration of an entail always begins with fraud. When there is any flaw in the title, it is another case. With respect to argument, that the minister could not have drawn his stipend unless May had paid, the answer is good,—that, independent of May's lands, the fund of payment was sufficient. When May says that he possessed upon tacks, I will not believe him; for I will not presume that a man possessed his lands while another possessed the teinds: *this* would be contrary to the legal presumption. Here is a rasure, but no vitiation of the precept 1662; for the rasure was made before the deed was signed. By the sale 1694, all titles were conveyed to the purchaser; and, consequently, the charter of apprising was also a title, and it was a prescriptive title of the teinds.

ELLIOCK. I would be sorry to impinge upon the statute of 1617. Were there evidence that May had possessed for 40 years without challenge, the defence would perhaps be good. The argument as to 1617 does not apply. There was a parsonage: the *initium possessionis* was a tack which did not expire till 1707. In 1708, the parson, for such Freswick was become, challenged May's right. May did not plead on any heritable right, but on his tack. May he, after 30 years, go back to his heritable right? No. The answer is good,—You, by acknowledging your possession on the tack, have put it out of my power to prove your possession, especially as the means of proof must be in your own hands; and you will not depone and exhibit without an agent at your elbow.

KENNET. When the question is as to the nature of teinds, I will inquire into the right of teinds. The bishop had no right, neither had the family of May; nothing but *decimæ inclusæ* granted, that is only the Piper's Croft: so there is no title here, neither is there 40 years' possession. May could not change his possession, nor did he change it.

JUSTICE-CLERK. After the new light thrown upon the cause, I can have no doubt. I do not touch, nor mean to touch upon the salutary law of prescription; but I hold that, in interpreting charters, we must follow the same rules as in interpreting any other deed. Possession upon tack was admitted judicially, and mankind must be bound by judicial deeds.

PRESIDENT. I wish that the argument from the favour of the statute 1617 had been omitted; for I am as fond of the statute 1617 as any one can be, and it is in no danger from a judgment in this case. Forty years' heritable title is not all which that statute requires: *Possession* also is requisite. It is plain that the bishop had no right, and that there was no possession on the heritable right. Neither do I like the vitiation in the precept 1662.

On the 27th June 1771, the Lords found that the defender has produced no heritable right to the teinds of his lands in question; and therefore found him liable to the pursuer for those teinds; adhering to interlocutor 18th January 1769, altering interlocutor 16th June 1769.

Act. W. M'Kenzie, A. Lockhart. Alt. D. Rae, R. M'Queen.

Reporter, Stonefield.

Diss. Pitfour, Monboddo.

After determination, Lord Barjarg said, that Pitfour had galloped away upon his hobby horse, the Act 1617. Hailes said, that Pitfour regarded nothing in that statute but the sheep's-skin part of it, laying possession out of the idea.

1771. July 3. HUGH DALRYMPLE of Nunraw *against* The EARL of EGLINTON.

TEINDS.

In a process of valuation of lands, let at an advanced rent, payable in future,—the tack-duty payable when the action is raised and proof taken, held to be true rental.

[*Fac. Coll.*, V. 277 ; *Dictionary*, 15,759.]

MONBODDO. By the statute, *rent paid*, not *rent payable*, must be the rule. There is no dependance to be had upon new rents, especially when not yet exigible.

PITFOUR. There are no words in the statute, 1633, which point at any other rent but that constantly payable.

HAILES. I do not approve of the pursuer's hypothesis,—that the commissioners taking a proof under the authority of this Court, are to be considered as the sub-commissioners of the last century. Nevertheless, I am clear that this case cannot be differenced from that of the *Duke of Argyle* and the *Heritors of Dollar*, July 1770. That case is referred to by the one party, and not contradicted by the other.

JUSTICE-CLERK. There have occurred various cases, within these twelve-months, where even payment of a new rent for a year was disregarded.

On the 3d July 1771, "The Lords Commissioners of teinds found that the old rent must be the rule, and decerned accordingly."

Act. D. Dalrymple. *Alt.* A. Lockhart.

N. B. Sundry specialties were urged, rendering Mr Dalrymple's plea more favourable ; as that the additional rent was partly occasioned by his objection to lime, inclose, &c. ; but the judgment of the Court went entirely on the general point.

1771. July 17. THOMAS MANSON *against* JOHN ANGUS.

BANKRUPT.

Reduction upon the Act 1696, c. 5.—Deposition of a Bill of Exchange, in security of a former debt, falls under the statute.

[*Faculty Collection*, V. p. 280 ; *Dictionary*, *Appendix I.* ; *Bankrupt*, No. 7.]

MONBODDO. The being of the statute, 1696, depends upon our determination in this case. If we give countenance to Angus's practice, a door will be

opened to disappoint the purposes of the law. A creditor will not take an assignation to a bond due to his debtor; for that would be taking security, in terms of the Act 1696; but he will take possession of the bond itself, retain it till due, and then go with his debtor to the debtor in the bond: his debtor receives payment, and pays the money over to him. Such would be the consequences of Angus's practice. If I could not find principles I should not judge from consequences. I am here clear, upon principle, that there was an impignoration, making Angus preferable to an after assignee. If here there was nothing more than the *possession* of an instrument of debt, I would be clear for Angus: *here* there is more,—a paction of impignoration in security. This would have been good against Farquhar pursuing an exhibition, and also good against Farquhar's creditors. His creditors arresting could not be in a better situation than himself. (There are no pledges now of heritable rights. Heritable bonds, &c. are only rights in security: these rights of security are said, by an Act of James III. to be a novel invention.)

GARDENSTON. I hold that *here* there is a *legal* though not an *actual* fraud. Were I to write a treatise upon the maxim of the Roman law, that *fraus est ubi aliud agitur, aliud simulate concipitur*, I could not find a more apt illustration than the present case. What was truly done, was to get the benefit of indorsation: What was meant to be done, was to avoid the retrospect of the statute.

PITFOUR. Payment falls not under the Act 1696, and indorsation in security does. Many a fair deed may be struck down by the Act 1696, for no man can foresee the future condition of his debtor. The bill was indorsed, and in Angus's hands before payment, no matter for how short a time: as to that, the law makes no difference.

KAIMES. The question, Whether, here, a *security* was meant or a *payment*? There is no law in any country with such a retrospect as that in the Act 1696. Here the transaction has every mark of a payment: the first step was to demand payment; the last to make payment. If *this* is not considered as payment, what will become of draughts on the bank which are not immediately paid?

AUCHINLECK. I cannot subscribe to the opinion first delivered. Can an impignoration of a bill have the effect of creating a security on the debt therein contained, any more than an impignoration of titles can have the effect of creating a real right on lands? The question here is, Was payment or security meant? If the bill was indorsed, it must have been originally intended as a security. This case comes within the Act 1696.

COALSTON. Were Angus to prevail, the Act 1696 would be eluded. Impignoration is not sufficient to disappoint creditors, yet the transaction falls under the sense of the Act: the Act, being to prevent frauds, must be liberally interpreted. An indorsation in payment would fall under the Act, were it not for the decisions to the contrary. I should have thought that voluntary payments fell under the Act: a *virtual* disposition falls under the Act, as much as an *actual*. Supposing that the bill was not indorsed till after it came into Angus's hands, it still remained in Angus's hands; and so the creditors, Johnston and Smith, understood the fact.

JUSTICE-CLERK. I think that actual payments are rightly found not to come within the statute: the contrary doctrine would be fatal to commerce. No man has his estate in ready money laying by him. There is no danger in suffering a man to pay his just debts, in so far as he has money by him; but the law does not suffer him to touch upon his securities. The line therefore is well drawn by our decisions, and I will keep strictly to it. The case of draughts on the bank does not apply: *there* the holder of the draught gives up his voucher of debt; *here* the bill was not given *in solutum*, but as a security, no matter how short the security was to last.

KENNET. This was no ready money payment: the receipt given by Angus is sufficient to fix my opinion. Angus gives a receipt for two bills, one of them at a distant day of payment, and far exceeding the sum due to him.

PRESIDENT. I do not think that deposition of a *nomen* is effectual by the law of Scotland, nor that an actual payment falls under the Act, nor that a draught on the bank or on a factor falls under the Act, for that such draught is supposed to be payment. This case however falls under the Act, for a security was meant.

On the 17th July 1771, "the Lords sustained the reason of reduction founded on the Act 1696;" altering Lord Elliock's interlocutor.

Act. Ilay Campbell, A. Lockhart. *Alt.* R. Blair, R. M'Queen.

Diss. Kaimes.

1771. July 18. WILLIAM TOSHACK *against* ALEXANDER SMART.

PUBLIC OFFICER.

Statute 1696, cap. 26.—In the election of a Parochial Schoolmaster, Heritors who, by their title-deeds, are liable in payment of cess and parish burdens, have a title to vote, whether their lands stand separately valued on the cess-roll or not. The liferenter, in the right of voting, preferred to the fiar.

[*Fac. Coll. V.* 286; *Dictionary*, 13,134.]

AUCHINLECK. It is a strange idea that no man can have a vote in the election of a schoolmaster unless his valuation is separate in the cess-books. In the choice of a member of Parliament, a certain valuation is required to entitle a man to a vote. In the division of commonties, it is necessary to know the valuation, in order to ascertain the portion to be allotted to every one having interest: *here* it is admitted, that the voters are heritors, and that they paid cess. No more is required.

KENNET. The rule is well laid down in the case of *Kirriemuir*.

COALSTON. I even think that the same ought to be the determination, although the authors of the parties had been bound to relieve them of the cess. All are entitled to vote who have a valued rent.

AUCHINLECK. All small heritors, just as mites in a cheese, are our fellow-creatures.

On the 18th July 1771, "The Lords found, that every heritor or proprietor of lands and houses in the parish of West Kirk, who, by his title-deeds, is liable in payment of cess and parish burdens, has a title to vote in the election of a schoolmaster of said parish, whether such heritor's lands stand separately valued on the cess-roll or not: Found that, in the case of a liferenter or fiar, the liferenter has a right to vote on the liferented subjects, and not the fiar;" adhering to Lord Monboddo's interlocutor.

Act. A. Belches. *Alt.* J. M'Laurin.

1771. June 15. JAMES BRENNER *against* LIEUTENANT-COLONEL JAMES SINCLAIR.

BONA ET MALA FIDES.

Money found in the Repositories of a Factor. *Bona fide* intromission therewith. It gives a legal title of competition with Creditors.

[*Faculty Collection*, V. p. 263; *Dict. App. I.*; *Bona et Mala Fides*, No. 2.]

PITFOUR. Whenever my money is in my factor's hands, if I can prove the identity, I am entitled to retain it. So it was determined in a late case of *Ruthven's Creditors*.

KENNET. In that case the identity was proved; not so here.

PRESIDENT. There may be cases where money may be detained as the property of the master; as when a factor, just after receiving a certain sum, breaks his neck by a fall, and has that precise sum in his pocket: but here there is not sufficient evidence that the money detained by Colonel Sinclair was the money received by the factor in payment of the rents.

KAIMES. Colonel Sinclair possesses the money *bona fide*: ought he not to be allowed to retain it, in so far as to create a *pari passu* preference?

JUSTICE-CLERK. Colonel Sinclair acted *bona fide*, and intromitted with the money at the sight of the nearest of kin.

On the 18th June 1771, "The Lords, in respect that the money intromitted with is not proved to have been the rents received by Ross, found that Colonel Sinclair has no right of retention, further than to so much as extends to a proportional share with the executor-creditor;" varying Lord Gardenston's interlocutor.

Act. G. Wallace. *Alt.* W. Mackenzie.

Diss. As to any retention at all, Barjarg, Elliock, Stonefield, Hailes, and Monboddo.

1771. July 18.—**COALSTON.** There is a distinction between money-rent and victual-rent. Victual in my giral, whereof my factor has the key, is mine:

there is a difference as to money-rent, unless the identity is proved ; and therefore the first part of the interlocutor is well founded : but I do not understand how a *bona fides* can give any right which the law does not give. I am glad to see that Colonel St Clair did not open any repositories, but received the money from the executor : Still he must be just in the same case as other creditors.

KAIMES. The interlocutor does not stand upon the footing of preference. Colonel St Clair received payment of a just debt from the nearest in kin : still there is a *res in medio* attachable by all the creditors.

Queritur. Is not this sufficient to render unnecessary a citation of the executor's creditors ?

GARDENSTON. I would adhere to the rules of law. There is a certain way known in making up titles. No person can lay to his hand. There is certainly a *bona fides* on the part of Colonel St Clair ; but *where* is that to stop ? The case of *Magbiehill* was erroneously decided. I may say so : for the Court itself, in a late case, (Galloway,) has said so.

AUCHINLECK. I have no doubt of Colonel St Clair's *bona fides* ; but he has been ill advised. The executor *qua* nearest of kin might have paid *primo venienti*, providing the *primus veniens* had taken a decret. *Here* the rule applies *vigilantibus jura*. It is dangerous to say that a man, by acting irregularly, is in as good a situation as if he had acted regularly.

KENNET. If Colonel St Clair had taken a decret, he would have drawn his *full debt*. May he not still draw *his proportion* just as if he had used a citation ?

PRESIDENT. Suppose the executor *qua* nearest of kin had made a division among all the creditors except one, who did not concur, would you allow *that one* to carry off the whole subject ?

JUSTICE-CLERK. There was no occasion for the executor *qua* nearest in kin to place this sum in the inventory, because it was already in his hands : He paid to Colonel St Clair, because he did not suppose there was any other creditor. May the other creditors, after years are elapsed, come in and claim decret, so as to exclude Colonel St Clair ?

COALSTON. Creditors, who all use diligence within six months, will be *pari passu* preferable : after six months, the creditor who is first in diligence will be preferable to all others. Here payment was made by an executor to a creditor without decret : such payment gives no preference. Why bring him in *pari passu* ? This deprives the other creditors of the *jus quæsitum*, which they had already by decret. It unhinges the whole doctrine of confirmation.

KAIMES. The creditor who has received the money cannot do diligence. All that he asks is a *pari passu* preference, which he would have got had it not been for the accident of the money being in his hands.

On the 18th July 1771, "The Lords adhered to their interlocutor of the 13th June 1771."

Act. G. Wallace. *Alt.* W. M'Kenzie.

Diss. Gardenston, Auchinleck, Barjarg, Coalston, Hailes. Absent, Alemore, Stonefield, Monboddo.

This judgment, more distinguished, in my apprehension, for equity than law,

was carried by the President's casting vote. It has so many circumstances attending it, that there is little hazard of a case exactly similar occurring once in a century.

1771. February 28. ALEXANDER IRVINE of Drum *against* EARL of ABERDEEN.

GROUNDS AND WARRANTS.

Letters of general and special charge, being warrants, not necessary to be produced after twenty years.

[*Faculty Collection*, V. 247 ; *Dictionary*, 5187.]

PITFOUR. It was determined, in 1725, that general charges were *warrants*, not *grounds*. Warrants are not to be forced after the lapse of twenty years.

AUCHINLECK. In the case of *William Sellers*, 1757, it was found, contrary to my interlocutor, that general charges need not be produced after twenty years ; and this has been held in practice ever since.

MONBODDO. The words of the decree are express : besides, the pursuer is bound to produce the charges, if in his possession. The lapse of twenty years affords an excuse for not producing papers, if mislaid or lost. I do not think that the defender has the privilege of keeping up papers whereof he is possessed. *Charges* in one decision are considered to be *warrants*, I think erroneously. Warrants are the steps of process ; but grounds are the writs and evidents, the foundation of the decreet. Of this nature are charges general and special. In the case of *Sellers*, there were many specialties. It carried by President Craigie's casting vote against the opinion of Lord Elchies.

PITFOUR. The case of *Sellers* was not determined upon specialties. The same judgment had been previously given in the *Creditors of Carthrene*.

PRESIDENT. In argument, stress may be laid upon specialties ; nevertheless, the judgment in the case of *Sellers* was in point : it would be dangerous to alter it. I will not do that injustice to the House of Lords, as to suppose that it meant to order every deed to be produced, without considering what was the nature of the deeds, or what was the law of Scotland.

GARDENSTON. I doubted of my power as an Ordinary to limit the words of the decree of the House of Lords : besides, I do not see a reason for the decision in the case of *Sellers*.

COALSTON. In consequence of the decision of the Court of Session, I have held that *charges* are *warrants*, and that, after 20 years, *warrants* need not be produced. In strictness of speech, nothing is a *warrant* but the judgment of the Court. The meaning of the decree was to repel the preliminary defence, and to find that the defenders must take a day to produce. The words of the decree are inaccurate ; and hence, the pursuer endeavours *captare verba*, contrary to the purpose of the House of Lords.

KAIMES. If charges are to be called *grounds*, every thing may be called grounds; and, in particular, the final interlocutor of the Court on which the extract is *grounded*. We are not bound to take the *words* of a decree of the House of Lords against its *meaning*, more than we are bound in the case of an Act of Parliament.

JUSTICE-CLERK. Challenges that go to the *justice* of a debt are preserved for 40 years; but the Court never acted more salutarily and wisely than in finding that an adjudger is not bound, after 20 years, to produce *warrants*. Every thing, not *grounds*, is *warrants*. The Court has made no distinction whether the warrants are in a man's possession or not; and, indeed, there is not a distinction: for why should a man be favoured for having lost the warrants, more than he who has chanced to keep them. If you pass 20 years, you must go back for 40 years; perhaps much farther if there are minorities. If you take the words of the decree literally, all executions, &c., must be produced. I will not put such a construction on the decree.

On the 28th February 1771, the Lords "found, in respect that general and special charges are not *grounds*, but *warrants*, and that *grounds* are not required to be produced after the lapse of 20 years; that, therefore, the defenders are not obliged to produce charges or other warrants of adjudication;" altering Lord Gardenston's interlocutor.

Act. J. Fergusson. Alt. A. Lockhart.

Diss. Monboddo.

July 19.—MONBODDO—Held as formerly that special charges were *grounds*, not *warrants*: that there is only one decision to the contrary, that of *Sellers*; and that it proceeded on specialties.

HAILES. It is impossible to say that there is but one decision: there are many on this point. The judges who sat in Court when the case of *Sellers* was determined, said that it was not determined on specialties. I will not so interpret the judgment of the House of Peers, as to suppose that, even without hearing the cause, it meant to subvert the usages of Scotland.

PRESIDENT. If special charges are *grounds*, it would be no defence that they were lost; for, if *grounds*, they must be preserved, and, when lost, they are lost at the risk of the person whose title is founded on them.

COALSTON. A special charge is no ground: it is no part of the pursuer's progress.

GARDENSTON. I now think that a special charge is part of the process, and therefore a warrant.

On the 19th July 1771, the Lords, "in respect of the reason mentioned in the former interlocutor, and that general and special charges are no part of a pursuer's title, but produced as evidence of a passive title against the defender; and also in respect of the former decisions of this Court, and of the acquiescence of the nation therein; they adhered to the former interlocutor concerning general and special charges."

Act. D. Rae, &c. Alt. H. Dundas, &c.

1771. July 26. MRS ELIZABETH NIMMO *against* ANDREW ST CLAIR.

TENOR—PROVING OF THE TENOR.

What is sufficient evidence for that purpose?

[*Faculty Collection*, V. 292; *Dict.* 15,825.]

AUCHINLECK. The only question at present is, as to the proof of the tenor. Proving the tenor is a nice question. Here it is pleaded that there must be adminicles in writing; but it is proved that Lady Jane Nimmo put the deed in the fire. One owes a bill, and asks to see it; he swallows it: would he be allowed to require adminicles in writing for proving its tenor? As the *casus amissionis* is admitted, the assignation, without power of revocation, is also proved. But *here* there is an extraordinary clause, that of delivery to Mr Nimmo; it requires an adminicle in writing, and it is not even proved by witnesses.

KENNET. Lady Jane admits that the deed was delivered to Mr Nimmo; and so Mr Nimmo himself averred. If Lady Jane had kept possession of the second deed, it would have been no better than the first, in whose place it was substituted.

PITFOUR. The intention of granting the deed at all, is inconsistent with the idea of revocation. Lady Jane acknowledges that she left the deed upon the table; that Mr Nimmo took it and kept it: it was to be the ground of a translation. Mr Nimmo was the proper custodiar, being the father of the grantees of the fee.

COALSTON. It is agreed that the *casus amissionis* is proved, and that the deed was destroyed by Lady Jane. When a special *casus amissionis* is proved, there is no occasion for adminicles in writing. We must not separate the proofs. Lord Marchmont's evidence, written adminicles, real evidence of the *res gesta*, may not be sufficient singly, but are jointly; so we must judge when the destruction of a deed by a tortious act is proved.

ALEMORE. It is said that *here* is an extraordinary clause: Not so; for every clause in a deed is common or extraordinary, *secundum subjectam materiam*. This clause is not extraordinary; for a contrary clause would have been inconsistent with the purpose of the parties.

On the 24th July 1771, the Lords "found the *casus amissionis* and tenor proved."

Act. R. M'Queen, H. Dundas. *Alt.* H. Campbell, A. Lockhart.

1771. July 26. ANDREW FERGUSSON *against* JAMES SMITH and OTHERS.

BANKRUPT.

Evidence of Absconding.

[*Woodhouslee's Dict. III. 54 ; Morrison's Dict. 1,109.*]

PRESIDENT. I doubt whether a search implies *absconding*, and whether *insolvency* must be presumed without proof.

GARDENSTON. In the case of one *Stewart* from Perth, a search was found to be evidence of absconding.

COALSTON. It is a good evidence, *prima facie*, but may be redargued. As to insolvency, the defenders have taken from the debtor all his goods they could find, and offer a proof of other effects.

On the 26th July 1771, the Lords "found that the debtor fell under the Act 1696;" adhering to Lord Barjarg's interlocutor.

Act. A. Rolland. Alt. D. Armstrong.

1771. July 30. PATRICK GRAHAM and OTHERS *against* SIR ROBERT POLLOCK.

CLERK OF SESSION.

Security of the Clerks of Session over papers produced in Process, for payment of their Fees.

[*Facts in Supp. V., 416.*]

COALSTON. By the constitution of this Court the clerks have only dues of office, no salaries. Although processes are transacted, they have still right to dues. For this end they have two means, retention of the pieces, and a claim of payment against each party for one half. The claim is for trouble, and that claim lies, although no writings are produced to found an hypothec.

PRESIDENT. I doubt as to some of these principles: the hypothec is total. If one of the parties becomes bankrupt, are the clerks to have only one-half of their dues?

GARDENSTON. The demand is, that the clerks be ordained to give up the pieces. As there has been no extract taken, this cannot be done.

ALEMORE. Till the price of extract is paid, the clerk must keep the pieces. Let the petitioners pay, and then bring an action against Sir Robert Pollock for his share of the expense, if such share is exigible by them from him.

On the 30th July 1771, "the Lords found the clerks entitled to retain the pieces, till a certificate of an extract is produced ; and therefore refused the petition."

Act. J. M'Laurin. Alt. Ilay Campbell.

1771. January 22. ALEXANDER GORDON of Culvenan *against* JEAN MACCULLOCH, JAMES DEWAR of Vogrie, &c.

TAILYIE—JUS QUÆSITUM TERTIO.

The proprietor of an estate having duly executed an entail proceeding on a mutual contract, in his own favour, as liferenter, and to his institute as fiar, with a substitution of heirs ; and the deed having been recorded, and an investiture expedited thereon,—the said liferenter, and fiar, cannot, by their joint act, alter or revoke the entail to the exclusion of the substitute heirs.

[*Faculty Collection*, V. 300 ; *Dict.* 15,579.]

AUCHINLECK. The entail in question is nearly as foolish as old *Barholme's* entail : but, if people will play the fool, there is no help for it. We must judge according to the rules of law. When the maker of an entail has reduced himself to the state of a liferenter, and when the institute is reduced to the state of a limited fiar, they can do no more jointly than they can do severally. We might as well say that the institute and the next in the entail, may, by concurring, disappoint the entail. This indeed is more specious than the present case ; for these two have a greater interest in the subject than the liferenter and institute have. Many decisions are quoted, but I wish to have seen principles. As to the case of *Lindores*, the entail there was not executed : it lay in the hands of the consignatar for the behoof of all concerned ; and, therefore, first of all, for the behoof of the entailer himself. The case of *Balnagown* was determined, as the judgment bears, upon circumstances. How can we find that two men, under fetters, become free by joining together.

MONBODDO. Every settlement of succession by the law of Scotland, however different in form, is of a testamentary nature. It is of the essence of a testament that no man can so bind himself as not to reserve the power of altering. That a deed should be a testament, and yet out of the power of the testator, is a contradiction. Upon the supposition that the entail in question had been the sole work of the father, it would have gone for nothing ; but the difficulty is, that the interest in the subject was divided betwixt the father and the

son. Of consequence, neither the one nor the other could alter,—but it does not follow that they cannot alter jointly. When they join, it is the same thing as if the fiar and the liferenter had been the same person : here there is an equivalent to a renunciation by the son in favour of the father. I am clear, however, that this entail cannot be revoked, as being made for an onerous cause. Mrs Gordon might, for herself, renounce any right in the entail, but she could not renounce for her children.

COALSTON. An entail made where the entailer remains fiar, may be altered. Another question, how far it may be altered where the entailer retains only a liferent? I think that the concurrence of the institute is sufficient in such case. An institute, by non-acceptance, may void the entail, why not by renunciation also? Without laying down this rule, I cannot reconcile decisions with principles. This argument relates only to entails made *proprio motu*, not to cases where there is an antecedent obligation, or mutual contract : here there is a mutual contract which cannot be set aside. Mr Gordon, for himself, and children, were as much contractors as Mrs Gordon was. Her consent cannot annihilate the mutual contract.

JUSTICE-CLERK. I have long had an opinion riveted in my mind, that by our law there is a distinction between a disposition and a testament. A testament, without a power to alter, is a contradiction ; and yet a man may put prohibition on himself by a disposition or settlement of his land estate in the form of an entail. This maxim is laid down by Hope, Mackenzie, &c., and is, I think, agreeable to principles. Here there is more : still the entailer is reduced to the state of a liferenter, having no power over the estate : The institute is not a fiar at large, but under limitations. How can they two, who have not jointly a power over the estate, jointly set aside the entail? Mrs Gordon could only renounce for herself.

GARDENSTON. In part of my opinion, I have the aid of my brethren ; in part I shall probably remain single. With some, I am clear that *voluntas est ambulatoria* ; with others, that a liferenter and fiar may alter by their joint act. But I farther think that an entail, made upon a mutual contract between two parties, may be voided by mutual consent, although there be a provision made for heirs ; because *unumquodque eodem modo resolvitur quo colligatum est*.

KENNET. I rather incline to think that a man may alter, although he reserved no power ; and that the fiar and the liferenter, as in this case, might jointly alter. No decision says the contrary. The decision in the case of *Harden* is strong for my opinion. Nevertheless, we cannot give relief here, for the entail proceeded on a mutual contract. Mrs Gordon could not, by herself, revoke ; for both her husband and her children had an interest.

PITFOUR. Many very ingenious arguments have been used to give relief, and I was very ready to be caught by any of them ; but I have not been caught. Last wills are plainly out of the question here. It is said “ that Barholme has not tied down the institute from giving back the estate to him.” There is something plausible in this : but then, there are other parties, there are limitations to heirs of entail, and they have a *jus quæsitum*. Upon this footing all the securities of marriage-contracts stand. The only way to remedy the inconvenience which may hence arise, is by a temporary *salvo*, allowing an alteration

with the consent of certain persons : and yet even this is a precarious and imperfect remedy, for those persons may die. As to the case of *Orbiestoun*, it was rightly decided, but it does not apply to the present question ; for there the first institute did not take at all. Neither do the cases of *Harden* and *Balnagown* apply. Various and particular circumstances occurred in both. In the first there was no infestment ; the second cannot be a rule, for the interlocutor itself proceeds upon specialties. Could we give a relief here, it would be too wide a relief, and would reduce the estate to a fee simple. But the House of Lords might authorise a partial or a total sale, and appoint the surplus to be of new entailed. This we cannot do.

PRESIDENT. The question is, Can the Court set aside this entail ? I have long thought that a liferenter and a fiar could not jointly alter an entail in which the one has no right of property and the other no more than a limited right. I founded this judgment upon what I learned, when a bystander, in the case of *Balnagown*. It was there said, (by Lord Arniston,) that there was a great difference between personal and real rights. If once a feudal investiture is created, a man cannot alter, for he has no longer in him that estate which is requisite for the purpose of altering. The liferenter cannot, for he has no fee : the fiar cannot, for his fee is limited. There is another question, here, as to the effect of the mutual contract,—and there I have more difficulty. Barholme, by contracting debt, had made it impossible for him to execute the entail effectually : How then could he have been obliged to execute the entail ? If by error he has executed it, and the party contracting with him is sensible of the error, and is willing to depart from the entail, what should prevent this ? Had there been a declaratory conclusion in the summons, setting forth the circumstances of the case, it might have gone far in the Supreme Court, as it did in the cases of *Maulsley*, *Caringtoun*, and others.

On the 22d January 1771, “ The Lords sustained the reasons of reduction of the trust deed, and assoilyied from the reduction of the entail.”

Act. A. Lockhart. Alt. R. M'Queen. Hearing in presence.

Diss. Kaimes, Gardenston.

1771. August 25.—MONBODDO. I have always held, that any gratuitous deed of succession is alterable ; and that no man can be creditor to his heir, unless in consequence of a previous deed. It does not move me, that the fee and the liferent are divided here, since both fiar and liferenter concur in altering : but *here* lies the difficulty : The parties to the contract are Barholme, for himself, and as *administrator-in-law for his children*, on the one part ; on the other, Mrs Gordon and her family. He became bound to entail his estate on a series of heirs, whereof Jean Macculloch is one. One motive for this was, *the preservation of the family of Barholme* ; the onerous cause was, that Mrs Gordon should not oppose the reduction of the old settlement : If the law of Scotland allows one party to stipulate for another, and thereby to acquire a right to another, *here* there is a right acquired to Jean Macculloch, whereof no one can deprive her.

PRESIDENT. My difficulty is from the nature of the transaction. The reduction of the old settlement was a beneficial act for all concerned; more so for the nearest in kin of old Barholme, than for Mrs Gordon, a remoter substitute. Barholme contracts for his children, though the thing was for their interest, independent of any contract. Mrs Gordon had no concern in contracting for them. Mrs Gordon and her family say, We do not desire to keep you bound,—we recal the inhibition, and we leave you at liberty to do what you please. Can Jean Macculloch insist that the contract shall remain binding, though it is ruinous to all concerned? She could not have inhibited, for she was not a party upon that side of the contract.

COALSTON. I am willing to proceed upon two suppositions, both which are very doubtful; 1st, That one may alter a tailie containing clauses irritant and resolute; 2dly, That, when he leaves no more in himself than a liferent, he may alter with consent of the fiar. But all this will not remove the difficulty; for *here* is a tailie for an onerous cause; here is a *jus quæsitum* to Jean Macculloch: for, by the law of Scotland, one may acquire for another. Mrs Gordon had her own interest and that of her children chiefly in view; yet a contract was made, by which Jean Macculloch also was benefited. How can her right, once constituted, be disappointed? The entail, it is true, is ruinous; but so are many entails where the Court can give no relief.

PITFOUR. It would seem that the appearance of Jean Macculloch is intended for the benefit of the pursuers, yet the argument is fairly stated, and without collusion. The dumb point of law is the obstacle here. Suppose that no tailie had been made, and that matters had stood *in nudis finibus contractus*, I should have thought that Jean Macculloch could not have forced implemment; for that Barholme and his children, whereof Jean Macculloch is one, were the obligants, Mrs Gordon and her children the obligees: but *here* an entail *has* been made; the property is away. If parties forget to reserve a power of alteration, this Court cannot relieve them. During the last century it may have had such a power; *now* it has not. There must, however, be some court which can grant relief; for there cannot be a *right* where there is no *benefit*, or a *wrong* where there is no *remedy*. In such case the Legislature will interpose although we cannot.

GARDENSTON. I do not see a substantial difference between the contract before and after the tailie: all the parties concerned may still agree to resolve the contract and tailie.

KENNET. As a tailie has been made, it is a great question how far the liferenter and fiar can concur, so as to alter effectually.

On the 30th July 1771, "The Lords found that the reduction could not proceed in respect that Mrs Gordon and her family did not insist; but found that Jean Macculloch had a title to defend in the declarator,—that there was a *jus quæsitum* to her by the entail, and assoilyied from the conclusions of the declarator."

Act. H. Dundas. Alt. G. Wallace.

No vote. President and Gardenston doubted.

1771. July 31. EDWARD TYSON *against* ALEXANDER CUNNINGHAM, &c.

ADJUDICATION.

Effect of Objections thereto in a Ranking.

[*Faculty Collection*, V. p. 295 ; *Appendix I.* ; *Adjudication*, 5.]

HAILES. The only purpose of this adjudication was to draw L. 200 sterling out of the subject, to the prejudice of Dunbar's creditors : The debt had been due little more than a year, when the adjudication was deduced without any diligence. It was preferable to all Dunbar's creditors. The only preferable debt to it was Janet Fleming's, and that debt was so small, and the fund of payment so large, that no one would have thought of adjudging merely for security.

COALSTON. There was a *summum jus* in leading this adjudication. A creditor may adjudge for his security, and we cannot enter into the question whether that measure is necessary or not ; but I would lay hold of the objection as to the summons being too soon called, and restrict the adjudication.

PRESIDENT. If you sustain the adjudication in this case, for penalties, you must in every one ; for never was there an adjudication deduced upon less occasion.

On the 31st July 1771, " The Lords restricted the adjudication to principal, annualrents, and necessary expenses accumulated at the date of the adjudication ;" altering Lord Gardenston's interlocutor.

Act. Ilay Campbell. *Alt.* R. M'Queen.

1771. June 21. COLIN ALISON, Wright in Edinburgh, *against* ELIZABETH FORBES and ANNE and MARGARET ALISONS, his Daughters.

PROOF.

Trust, how competent to be proved.

[*Faculty Collection*, V. p. 299 ; *Dictionary*, 12,760 ; *Supplement*, 5—630.]

MONBODDO. The heir of a party may be examined, as well as the party himself, for proving the trust. Witnesses may be examined, not for proving the trust, but for proving circumstances which may infer trust.

GARDENSTON. I would adhere to the strictness of the law. There is no favour here, for the alleged trust is founded on an avowed fraud. A proof of fraud, in matters of trust, has been allowed by the evidence of witnesses, where the fact was recent, and alleged to have happened at a public roup, where there could be no writing; but this case is totally different.

JUSTICE-CLERK. The case of *Lock*, and the others mentioned, related to what passed at a public roup. This cause is not a favourable one. A fraudulent concealment is averred by the pursuer.

ALEMORE. I incline to adhere to the words of the statute. Before the statute 1696 was enacted, many questions arose as to trust-rights: the legislature was obliged to fix down a rule. Few questions of that sort have occurred as to the proof of trust-rights since that time, and consequently we do not feel the inconveniences of the former practice. Parties ought to know the law. If they neglect the law in making their bargains, they are hurt by their own neglect, not by the judges who apply the law.

KAIMES. I never could reduce the exceptions introduced as to the statute 1696 to any certain rule. I never saw a case more directly under the statute than this.

PITFOUR. I would allow a proof. There is no difference between a man and his heirs. Fraud alleged in the original trust is no reason for the heir of the trustee keeping the estate. Here there is already some evidence in writing. This is sought to be confirmed by the testimony of witnesses.

PRESIDENT. If Thomas Alison were alive, Colin could only prove the trust by his oath, or by writing, not by circumstances. How can the death of Thomas alter the nature of the proof. The cases of *Marwell*, *Balbirnie*, and *Lock* are not in point: they all related to bargains of land which were brought into judgment *de recenti*.

AUCHINLECK. The Act 1696 was intended to prevent disputes both as to the constitution and extinction of trusts. In this case it is competent to bring evidence by the oath of parties, and by that alone.

ELLIOCK. I had no doubt that the heir might be examined; but that was not brought before me.

On the 21st June 1771, "the Lords found a proof by witnesses not competent, without prejudice to take the oath of the heir;" adhering to Lord Elliock's interlocutor.

Act. J. M'Laurin. Alt. D. Armstrong.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered:—]

1771. July 31. COALSTON. The difficulty arises from the words of the statute 1696. If they are too strictly interpreted, the interlocutor must be supported; but this interpretation has not been observed in former judgments. An entry in Thomas Alison's books would have been as valid if it had acknowledged the trust, as a back-bond would have been; and yet the Act says nothing as to such mean of proof. Thus also, if the defenders had been major and acknowledged the trust, relief would have been given. Facts and circumstances

have been found sufficient to establish a trust, as in the case 1762, *Earl of Lauderdale* against *Sir David Cunningham*, and again in a case of *Mr Alexander Ross*, the solicitor, where, without back-bond, facts and circumstances were found sufficient. Here it is already proved, *scripto*, that Colin Alison had levied the rents.

PRESIDENT. The case of *Sir David Cunningham* was attended with many strong circumstances, and it went as far as could well be gone. The case of *Alexander Ross* was different; for there *Ross* swore, but in such a way that the Court would not believe him.

ALEMORE. I must go upon the words of the Act of Parliament. When the words of an Act of Parliament are clear, I will not regard a decision to the contrary, if there is any such.

PITFOUR. The article for repairs, in Alison's books, is a strong written adminicle of the trust.

HAILES. It seems to me that that article is misunderstood by the parties. It runs thus—"To cash paid to Thomas Milne, for my houses in Conn's Close, L.2: 17s. sterling. *Nota*, There is one shilling and seven-pence *mine* for the shop-shade, &c." If Thomas Alison meant, as is admitted, that Colin should have the liferent of the house in Conn's Close, it was natural for him to separate the expense of the repairs on them from the expense of the repairs on subjects wherein Colin was to have no liferent; and this seems to be the sense of the entry.

MONBODDO. A trust may be inferred from the *res gesta*, without declaration, back-bond, or oath of party. Facts and circumstances may be sufficient if proved by writing; but if you allow them to be proved by witnesses, you circumvene the statute. Here even a direct proof of the trust is sought by witnesses. I do not oppose an examination of the parties.

JUSTICE-CLERK. Lord Hailes's observation is strong. Had the books contained an acknowledgment of the trust, it would have been good; but that is not the case.

PRESIDENT. I doubt whether the parties may be examined previous to oath; for the statute 1696 requires *oath* singly.

PITFOUR. This was done in the case of *Sir James Wood of Bonnington* and *The Earl of Northesk*.

COALSTON. Although the heirs were infants at the time of the transactions, they may be examined as to what they heard their father say.

On the 31st July 1771, "the Lords refused to allow the proof *hoc statu*, but remitted to the Ordinary to examine the heirs;" varying in some form the former interlocutor.

Act. J. M'Laurin. Alt. D. Armstrong.

1771. August 9. ROBERT HAMILTON, Provost of Kinghorn, against JAMES RUTHERFORD and OTHERS.

REPARATION—DEFAMATION.

Libellus famosus—veritas convicii non excusat.

[*Fac. Coll.*, V. 308 ; *Dictionary*, 13,924.]

AUCHINLECK. The maxim, *veritas convicii non excusat* has been sucked in with our nurse's milk, yet now it seems erroneous as generally understood. The error has arisen from distinguishing the criminal action from the civil. When a man comes to sue for damages, in which case only this Court has jurisdiction, the maxim does not apply. Here the defenders offer to prove their assertion to be true, and consequently no damages. We cannot condemn in damages where none are proved. But still my difficulty remains from the former judgment of the Court, which refused to allow a proof of the *veritas convicii*. Had the cause been as well argued formerly, as it is now, by Mr Ilay Campbell, the judgment might have been different.

PITFOUR. If a man is conscious of the guilt which another objects to him, he has no title to pursue for damages. The objecting the guilt to him is nothing but *denunciatio veri*. Shall we then say that any man may with impunity call another rogue and rascal? Not at all: the law takes cognisance of such outrages, and commits the prosecution to the public officer. When there is a radical calumny in averring of a falsehood, the private party may carry the prosecution as far as he pleases. In actions brought by the public prosecutor, the maxim, that *veritas convicii non excusat*, still holds, because the very uttering of such reproaches is hurtful to the public peace; nevertheless, in some cases, the *veritas convicii* may alleviate the punishment.

KAIMES. If I lay hold of a private fault in any man with a view to wreak my revenge upon him, I am inexcusable; yet I cannot blame the defenders, who, as burgesses of Kinghorn, desired to clear themselves. As a judge, I dare not say that this was done *malo animo*.

KENNET. In some cases *veritas convicii* will excuse: in others, not. If a man suffer a wrong, he may charge the offender with it even in conversation. But this case is different: the letter was wrote in a style not to expect an answer. The libel was published: it is very gross. The first interlocutor of the Court was pronounced with great unanimity, because the *animus injuriandi* was obvious. I could have wished that the Court had not sustained themselves as judges in matters of this nature; but *that* is now fixed.

GARDENSTON. Here was a malevolent idle accusation. Can we conclude that the magistrate is guilty, because the Court would not allow a proof? The former interlocutor, independent of every other consideration, has fixed this matter.

JUSTICE-CLERK. The defenders appeal to certain distinctions of the law of

England. I know nothing of the law of England ; and, although I did, I would not found my opinion on it. In judging of crime, the *animus* must always enter into consideration. I never saw a case where the *animus injuriandi* was more clearly brought home than in this case. At the time of writing the libel, the defenders had no idea of any evidence but the conversation between Mr Wemyss and the boatman. Their defence was, We will prove the fact of the bribery, but always in a general way. The Court refused to allow that proof ; and now that very refusal is brought as an argument for proving that there was just cause for the *convicium*. All men have right to their good fame till taken from them by public authority in a legal way. All laws establish a difference between possession and right : *Spoliatus ante omnia restituendus*. I will not inquire whether the subject is yours or not : this principle is necessary for the peace of society. The defenders had a legal remedy, which they used not ; but, on the contrary, abandoned it. I have no idea that the laws of this country allow men to vilify their fellow-subjects, under pretence of what they say being true. If we depart from those principles in the age wherein we live, confusion must ensue.

COALSTON. There are two questions here : 1st, Whether the publication of the libel is to be considered as a *famosus libellus*. 2d, Whether the conduct of the pursuer bars the claim of damages. As to the first, it is agreed that a report prevailed of Provost Hamilton having received a bribe : the defenders had right to inquire into the truth of this report. There was nothing wrong in the private letter. Provost Hamilton returned no answer : this silence authorised the letter to the council. The only difficulty is as to the publication of this letter.—But, if the letter was not illegal, how can the publication of it be illegal ? The conduct of the defender may have been indiscreet, though it was not criminal. As to the second question ; the pursuer has barred his claim of damages. There is a material difference between a prosecution at the instance of the public accuser and the private party. *Veritas convicii* excuses not in the former case, but it does in the latter. I am creditor to one of the banking companies for a note of £100 ; I send for payment,—receive an evasive answer. I write a letter requiring satisfaction ; no answer is made. I then publish the letter, and narrate the true *res gesta* : Would an action of defamation and damages lie against me ? If I call a man a bankrupt, who is notoriously so, what reparation is he entitled to demand of me ? The former interlocutor is what strengthens me. Were it not for that, I would say that it is impossible to discern a palinode, and, consequently, impossible to discern for damages ; that the public prosecutor may pursue for the public interest ; but that this Court is not called to restore the character of a guilty man.

HAILES. I am fully satisfied that the conduct of the defenders was malevolent and injurious. They accused Provost Hamilton at random, not for the sake of their own characters, or for the good of the public, but merely to satiate disappointed ambition. Notwithstanding all that I have heard, I am not yet satisfied that the generality of the maxim, *veritas convicii non excusat*, is erroneous. The distinction between *civil* and *criminal*, which the defenders make, may be just ; yet it is not the distinction which has prevailed in practice, and our law

is as much founded upon usage adapted to the temper and genius of the nation, as upon principles. I will not deny that cases may be figured where the *veritas convicii* will protect from an action of damages. Some characters may be so notoriously profligate, and some offences so generally known, that the person reproached may not have the front to pursue for damages; and, if he did, he might be refused them. Such was the case of *Fyfe*: a woman whom the whole town knew to be a bawd, could not well demand damages on account of her being called a bawd. The case of some sharpers, in the last age, might be assimilated to this. [I alluded covertly to such men as *Colonel Charteris*.] But *here* the case is totally different. Some men, from private resentment, charge Provost Hamilton as guilty of a crime: when they charge him, they know nothing of the matter; but, in an action for damages, they say, we have now discovered the crime, and we will prove it. I think that such an excuse, in such circumstances, cannot be received.

MONBODDO. I cannot distinguish between the chief magistrate of Kinghorn and the chief magistrate of the kingdom. We know what English juries have done, but we will not follow their example. Here is a *libellus defamatorius*, the produce of that license which now prevails.

PRESIDENT. (At the first advising.) From the earliest time it has been considered as an injury to slander characters. Were there no remedy in such cases, society would be endangered. In this particular, the civil law is the law of Scotland. An action arises for punishment and reparation: In Scotland, the Commissary Court is the proper place for bringing such actions: they are *always* brought with the concurrence of the Procurator-fiscal, and there is a conclusion for a *public punishment*. The rule that *veritas convicii non excusat* prevails in such case. The opinion of Carpzovius and of Blackstone agrees with mine. Carpzovius lays this down well:—If the defamation is purely with intention to hurt, punishment will be awarded; but a man may call another a thief, when he is ready to prove it for the benefit of society. Were an action still to be brought before the Commissary Court, I do not think that *veritas convicii* would excuse. The pursuer has mistaken his cause. The action for scandal has been overlooked: the action for pecuniary damages is brought. It has been found by this Court, that an action for damages and a palinode cannot proceed here. The conclusion for a palinode must be departed from. Gilbert admits that *veritas convicii* alleviates: if so, it must be proved. In the Criminal Court, do we not allow a proof of facts to alleviate as well as to exculpate? It is objected, Why did you not condescend? It was answered, You would not admit me into the cause. If the defenders are now allowed, they must condescend specially upon circumstances and witnesses. In no case where money is asked for damages, can money be given unless the damages are proved. In 1741, if every idle word had been actionable, and the maxim, *veritas convicii non excusat* had been opposed to every defence, many here present might have suffered deeply.

(At the second hearing.) I formerly inclined to the doctrine, that no damages could be awarded where the fact was true. I have, however, so imbibed the doctrine, that *veritas convicii non excusat*, that I know not how to cast it out. It was once a doubt whether this Court could judge in such matters: this

doubt has been got over ; but we still try such case in a civil light. Words may be used so as not to infer damages ; but, wherever there is a malevolent intention, and not a view of correction, *veritas convicii non excusat* : We cannot presume Hamilton guilty, when we ourselves would not allow a proof. The law presumes the words to be false, because the party had no right to use them.

ALEMORE. It is impossible to overhaul the first interlocutor. Actions of this nature are a new branch of business in this Court, and the law is not yet ripened as to them. I reserve to myself hereafter to determine as to the validity of the maxim, *veritas convicii non excusat*.

STONEFIELD. [This ought to have come in before the President's argument.] *Veritas convicii excusat in fervore iracundiæ*, but not where there is premeditated malice. See abridgment of the law by Gilbert, published by Bacon : he distinguishes between scandal by words and scandal by writing. In the last there is premeditated malice, but not in the first ; *King against Roberts*, 8th Geo. II. *Here* is premeditated malice : the defenders went on from step to step. The publication at the cross is altogether unjustifiable.

On the 9th August 1771, the Lords "found that the conduct of the defenders was malevolent and injurious ; repelled the defences : Found expences due ; but, in regard of the pursuer's consent, assoilyed from damages."

Act. H. Dundas, &c. *Alt.* Ilay Campbell.

Diss. Kaimes, Pitfour.

Alemore and Coalston voted with the interlocutor, upon the footing of the former proceedings being final.

1771. November 14. DUKE of QUEENSBERRY and OTHERS *against* MARQUIS of ANNANDALE.

SALMON FISHING.

Regulation of the Salmon-fishing upon the Annan. Demolition of a mill-dam dyke erected by an inferior heritor, refused. The stenting of nets, either entirely across the river, or placed alternately from side to side, but overlapping one another so as to obstruct the fish from getting up, found to be illegal, and prohibited. The placing of other engines or contrivances, which frightened and deterred the fish from coming up the river, likewise prohibited.

[*Fac. Col. V. 364 ; Dictionary, 14, 279.*]

GARDENSTON. The defender had right to erect the dam-dyke. As to the slop, the Act of Parliament defines its nature with much accuracy. With respect to the size of the slop, I would assoilye ; because the pursuers have not proved that a greater slop could have been made without prejudice to the going of the mill. As to the mode of fishing, in so far as nets of a new construction

are used *for taking fish*, such fishing is lawful, although many more fish are thereby intercepted, to the prejudice of the superior heritors ; but I distinguish between nets for *catching*, and nets for *interrupting* the course of the fish ; the latter are *unlawful engines* even in cruives, when permitted. There must be a *slop a fortiori* in this case, where no grant of cruives.

PITFOUR. Every proprietor may build a mill, providing he does not prejudice the right of others. The Act 1696 applies to mills to be hereafter built as well as to those already built ; but a right to make a dam-dyke does not give a right to prevent the fish from passing up. The legislature has required a *slop* as far as can be made, without prejudice to the mill : it is not proved that the *slop* could have been deeper without prejudice to the mill. As to the mode of fishing, every lawful mode of catching fish, without *emulatio vicini*, is permitted. It was so determined in the case of *Findhorn* ; but nets are only to be used in the time of fishing : at other times they are nuisances and unlawful engines.

COALSTON. I agree with the general principles laid down ; but still the difficulty remains as to the application. A trout-net is equal to a cross-dyke, and plainly unlawful, because it intercepts, but does not catch the fish : here there are also overlapping-nets : If they remain at all times of the tide, they are unlawful. Perhaps they are lawful, if the fishers are in the course of catching fish as long as they remain in the river.

MONBODDO. The Legislature considered the benefit of salmon-fishing, in general. Stent nets are worse than a cruive-dike, for they absolutely stop the course of the fish,—prevent their going up to spawn,—and, I believe, estrange the young fry from the river : for it is said that salmon only frequent that river in which they were spawned.

AUCHINLECK. The inferior heritors might as well put up an iron rail across the river, as use the nets they now use.

KAIMES. Lord Coalston's difficulty is owing to a mistake : Salmon are not caught in such nets as those in question, though such nets might serve to hang herrings.

PRESIDENT. I should even doubt as to hanging nets constantly cross the river, although salmon were thereby occasionally caught ; but *here* the fact is, that the salmon were stopped, not hanged in the meshes : This is not *fishing*, but *obstructing* the course of fish. I doubt also as to hanging a net at the arch of a bridge ; for that is, in effect, damming and laving, which is prohibited by law.

On the 14th November 1771, “ The Lords assoilyied the defenders, as to the caul : Found, that, although the inferior heritor has right to use all legal engines and methods for catching fish, conform to law and possession, yet he has no right, either in time of actual fishing, or at any other time, to erect any engine, or use any method not for the purpose of catching fish, but for preventing or obstructing them from passing up the river ; and therefore found that the methods used of stenting nets across the river, either reaching from side to side, or overlapping, or stenting across the arch of Annan bridge, or of putting in leisters, or stretching a rope with bones, are illegal methods, preju-

dicial to the superior heritors, and destructive to the fishing, and ought to be discontinued."

Act. A. Crosbie, &c. *Alt.* W. Baillie, &c.

1771. November 15. WILLIAM PARK *against* ROBERT CRAIG.

ADJUDICATION.

An Adjudication, where both the penalties and termly failies in an heritable bond were accumulated, found liable to the objection of a *pluris petitio*, and restricted accordingly.

[*Faculty Collection*, V. 199; *Dictionary*, App. No. I., *Adjudication*, No. 6.]

PITFOUR. Termly failies are adjudged for, and yet not due; for there was no poinding of the ground. Would cut off penalties and even expenses. It is true, that, since the Act 1672, there is no apprising; but still an adjudication must be led in the same form as an apprising for *debita fundi*: The only difference is, that the Lords of Session are the Judges, instead of the messengers, as of old. Apprising led upon termly failies, without a previous poinding of the ground, is improper.

KAIMES. It was an error to adjudge for termly failies, which are *debita fundi*: this is not a *pluris petitio* from intention, but from ignorance. I would not annul the adjudication, but I would strike off after-profits. Whatever is due in equity, is here due; *i. e.* the capital sum and annualrents accumulated at the date of the adjudication. Doubt as to expenses.

MONBODDO. The only question, How termly failies are to be made effectual? I think, in the same manner as the principal sum. I see no difference.

COALSTON. The adjudger has not adverted to a distinction in the Act 1672, which provides, that adjudications upon *debita fundi* must proceed as formerly, in apprisings, *i. e.* by a poinding of the ground.

HAILES. There is no reason for cutting off *necessary expenses*, for they will be no greater in this case than they would have been had the adjudication been regularly deduced. It is true that the adjudger has put the other party to expense in this cause: but this seems no reason for making a set-off of the expense of diligence against the expense of litigation, when it is considered that the plea was carried the length of annulling the adjudication altogether.

On the 15th November 1771, "The Lords restricted the adjudication to principal sum, and interest accumulated at the date of the adjudication, and the necessary expenses;" altering Lord Monboddo's interlocutor.

Act. G. Ferguson. *Alt.* R. Blair.

1771. November 15. LUDOVIC GRANT *against* GEORGE CHALMERS.

SOCIETY.

Powers of Management vested in the Acting and Surviving Partner of a Company.

(*Fac. Coll. V. 318 ; Dictionary, 14,581.*)

COALSTON. A copartnery is a corporation, and subsists as long as any member of it is alive ; and the surviving partner may uplift and assign. If he is a bankrupt, the heirs of the deceased partner may interpose and object : *here* the heirs are called, and do not object : It is *jus tertii* for the debtor to object.

PITFOUR. There is no doubt but that the surviving partner may act and even assign ; but, here, the case may be varied by his becoming bankrupt. This objection, however, is taken away by the representatives of Malcolm being made parties to the cause.

PRESIDENT. Malcolm was alive at the time of Thomas Fairholm's granting the assignation. It was therefore improper ; but Malcolm might have ratified it, and his representatives do the same thing by not objecting. It is now good.

On the 15th November 1771, " In respect that no objection is moved by the representatives of Malcolm, or by any person having interest, the Lords repelled the defence."

Act. R. M'Queen. Alt. A. Rolland. Rep. Monboddo.

1771. November 19. ROBERT WARRAND *against* HUGH FALCONER.

REPARATION.

Where one wrote a private letter, accusing an inferior postmaster, to his superior, of malversation in office, the same held to be an injurious libel, and actionable,—the accuser having declined to make good his charge.

[*Faculty Collection, V. 323 ; Dictionary, 13,933.*]

COALSTON. I cannot justify the conduct of Falconer, but I doubt as to the ground of action. In order to constitute a *libellus famosus*, there must be *animus injuriandi* and a publication. Supposing there was *here* an *animus injuriandi*, there is no publication, only a private information.

PRESIDENT. I do not blame an information, nor do I require a full legal

proof of it. But there was *here* private malice only, and no purpose of promoting the public good. The defender declines giving any account of his reasons for bringing so severe a charge. He does not even say that he ever heard from any one person that letters had been at any time opened at the post-house.

PITFOUR. There was more of private resentment than public spirit in this information. I would not discourage information in a discreet way. I will consider the *act*, not the *intention*. The interlocutor does no more than require a condescendence. If he can condescend on nothing, he is without excuse.

GARDENSTON. The case of *James* is not in point: *There* it appears that the commissioners of the revenue had already judged upon the information, and this Court would do nothing which seemed to tend to a review of their judgment.

JUSTICE-CLERK. It is impossible that a charge of this nature could be kept secret. It must have been published by the postmaster-general, else to what purpose was it brought?

MONBODDO. This was not a *libellus famosus*, but an accusation to be supported some way or other. If the defender will do nothing to support it, we must hold it to be calumnious.

On the 19th November 1771, "the Lords found the action competent, and ordains the defender to say whether he means to support his accusation, and by what evidence;" adhering to Lord Ellick's interlocutor.

Act. H. Dundas. *Alt.* A. Elphinstone.

1771. November 19. MAGISTRATES OF DUMBARTON *against* MAGISTRATES OF GLASGOW.

STATUTE.

Interpretation of, and the effect given to a Public Statute.

[*Faculty Collection*, V. 234; *Dictionary*, 14,769.]

GARDENSTON. This exemption is a private right, established by private contract and long possession. It is not agreeable to the principles of justice and the practice of Parliament, to abolish private rights without an equivalent. We are not to put a construction upon an Act of Parliament which is unjust, when we can put a just one. I do not think that the Act means any injustice: it mentions the new duty in place of the old anchorage, *i. e.* the anchorage as formerly levied, with an exception as to Dumbarton.

HAYLES. I would make a distinction. If the whole duty may be levied by

the Act, as much as is equivalent to the duty from which Dumbarton was ex-
 emed by the old contract, ought to be repaid.

COALSTON. When public statutes encroach upon private rights, courts of
 law cannot interpose. The words here are general, imposing the duty upon all
 ships. I doubt also as to the equity of the exemption claimed. The old exemp-
 tion was for anchorage at the old quay of Broomielaw ; but this duty is for ex-
 tending and improving the quay on both sides of the river. The window-tax
 was imposed by Parliament on the clergy in Scotland from an erroneous view
 of their condition ; yet this Court could give no relief.

PITFOUR. I cannot put Lord Gardenston's construction on the Act of Par-
 liament. The statute must be our rule. We cannot say that it was enacted by
 obreption : the Town of Dumbarton might have been heard against the statute,
 and may still obtain a repeal of it, if they are aggrieved.

KAIMES. This case goes deep into principles of law. If we are to suppose
 that Acts of Parliament are to be interpreted in strict words, even to the doing
 injustice to private rights, the supposition would be slavish, and the law des-
 potic. The Act of Parliament did not mean to forfeit Dumbarton of its privi-
 leges. To exeme a man on account of his circumstances is one thing ; to for-
 feit his privileges is another. This distinction answers the objection arising
 from the case of the window-tax. The ministers in Scotland, in respect of
 their circumstances, had been exempted from the window-tax, but they had no
 privilege to be exemed. In the case of *Roystoun*, an Act of Parliament said
 that debts were true debts. The Court here would not find the contrary. But
 this judgment was reversed upon Lord Hardwick's opinion. Suppose that the
 Act could not be otherwise interpreted, still the Magistrates of Glasgow, as re-
 presenting the community, must indemnify Dumbarton for having obtained an
 Act derogatory of the contract with Dumbarton. I think that the exemption
 can only go to the extent of the old duty.

MONBODDO. Here is a hardship upon the Town of Dumbarton : The same
 reason appears for exemption from the new duty as from the old. My diffi-
 culty lies upon our powers. The words of the Act of Parliament are general
 upon all ships who navigate the Clyde. We cannot introduce an exemption.
 The Town of Dumbarton ought to have opposed the passing of this law. Per-
 haps they would not have prevailed in their opposition. It might have been
 said that the Town of Dumbarton would profit to the extent of the duties.
 The case of *Roystoun* does not apply ; for that Act was obtained upon false al-
 legations of debts existing, which had been extinguished.

JUSTICE-CLERK. Although I am no slave to Acts of Parliament, yet I will
 always give my judgment upon plain words, and not put myself in the place of
 the legislature. The words of the clause are as strong and particular as can be.
 I think the duty must be levied ; but I do not see how the Magistrates of Glas-
 gow can defend themselves against the warrandice of the contract for repealing
 the old duty.

AUCHINLECK. Here is an onerous contract between the towns. It is only
 in consequence of this contract that the town of Glasgow came to have right to
 levy any tolls on the river. A right to levy tolls is granted by the Act ; but
 that does not take away the old contract. Suppose that the contract contained

an obligation to pay a sum, in case the duties were levied, would the Act take away that obligation without ever mentioning it? If the town of Glasgow has an immunity at Dumbarton, the town of Dumbarton must have an immunity at Glasgow.

PRESIDENT. This is an ungracious plea on the part of the town of Glasgow; yet I doubt how far this Court can apply the remedy. Over Acts of Parliament we have not the Prætorian power,—*adjuvare, supplere, corrigere*. The words of the Act are express. The case of *Roystoun* is not in point: for there was a private Act of Parliament upon a false narrative. The heir of entail was found to have right to the value of the subject, because the debts of the entailer were fictitious. Yet still the Court could not have stopped the execution of the Act of Parliament, because it proceeded upon a false narrative. A *personal* exception operates not against a *public* law. I doubt whether the town of Dumbarton may not insist that the contract is not binding on the one side more than the other.

BARJARG. Numerous inconveniences would arise were Courts of law to explain away the unequivocal words of an Act of Parliament. The original of this right was founded on a decreet-arbitral; so also may its modification be adjusted. This would be a wise measure in both parties.

On the 19th November 1771, "In regard that the Act imposes the duty on all ships, the Lords found that the Court can give no relief in *this* action; and therefore assoilyied."

Act. A. Lockhart. Alt. H. Dundas.

Reporter, Auchinleck.

1771. November 19. WILLIAM GARDNER and JOHN CAMPBELL *against* ROBERT AGNEW of Sheuchan.

DEBTOR AND CREDITOR.

Is a creditor bound, *de jure*, to assign his ground of debt to a co-obligant, who, without having been called upon before the term of payment, and, in particular and unusual circumstances, tendered him payment of his bond; and is such creditor, for having refused to assign, liable in damages to the co-obligant?

[*Faculty Collection*, V. 325; *Dictionary*, 3385.]

GARDENSTON. Upon the principles of the suspenders, a creditor would have action of damages against his debtor who did not pay between terms. It is not clear that there was any obligation to assign. It is plain that the old man Sheuchan was here required to do a thing at once which the judge would not have granted unless *causa cognita*.

MONBODDO. It is, no doubt, the law, that, at any time after the term of

payment the debtor is bound to pay. This may be often difficult, and some consideration may be had of that difficulty ; but, on the other hand, there is no difficulty. A creditor may at all times grant the assignation here demanded. It is fixed in practice that a creditor must assign.

PITFOUR. The reason of suspension is well founded as to one-third. I do not know any law that says that money must be offered or demanded at a term : that may be the case in wadsets, not in common personal bonds. Such demand between terms may be a matter of incivility ; but of that the law takes no cognisance. Here the creditor is *de jure* liable in damages : what those damages are is another matter hereafter to be examined.

COALSTON. If the suspenders prevail in their demand of damages, they will be lucky ; if the charger is cut out of his debt he will be unlucky. It is, no doubt, indiscreet in a debtor to offer payment of his debt between terms, yet in some cases this may be necessary, as in the case of a cautioner when the principal debtor is *vergens ad inopiam* ; but I doubt how far Sheuchan should forfeit his debt, merely because he did not assign the bond. This point of the obligation to assign is not so fixed as to make a country gentleman forfeit his bond for doubting of it.

JUSTICE-CLERK. Lord Gardenston has anticipated my opinion in judicial form. Parties being present, the Court will, *ex equitate*, order assignation. If, from the face of the bond, it had appeared that Donald was the principal debtor, the creditor would have been more to blame. If payment had been made in Court, the assignation might have been required ; but there are many things which a Court of law will order to be done, of which the creditor himself cannot judge. There is no reason for awarding damages when a creditor does not assign *causa non cognita*.

KAIMES. The creditor did wrong in refusing the assignation ; but then this wrong was innocently done. Were the subject in controversy a man's all, the argument for the suspenders would be the same. Still this is a nice case of damages ; but I observe that the offer of payment was in bank-notes. The acceptance of them is *voluntatis*, not *necessitatis*. Why should damage fall upon the creditor, when, if the co-debtors had taken a bond of relief from Donald, there would have been no damage : This would be to make the creditor liable to the debtor for the debtor's omission.

PRESIDENT. I would repel the reasons of suspension. The law has laid down no rule as to terms of payment. A creditor cannot effectually demand instant payment : he must first register the bond, and then charge ; *quia incivile est cum sacco venire*. Something of the same kind must prevail in the case of the debtor : some time must be allowed to a creditor for securing his money from thieves, or other dangers. It is unjust and unequitable to force immediate acceptance of money. In the case of the *Creditors of Buchan* it was found that no legal demand lay for an assignment. Every man that takes his debt is only obliged to discharge. Assignment is from equity ; so also are assignations of collateral securities still upon principles of equity. Hence also it was formerly doubted whether a cautioner can force assignation because he has relief. Here the proper method was to have brought an action for assignation. It was the fault of the suspenders that they needed assignation, by reason of their neglect to take bond of relief.

PITFOUR. The case of *Buchan* was as to assignation among creditors, in order to adjust their own preferences. The question did not arise from the obligation itself.

COALSTON. If a debtor refuses payment between terms, he is only liable in annualrent and penalty, not in damages: the right of the debtor can never be stronger than the right of the creditor. If a creditor can be obliged to receive, he can only be liable in the expense bestowed in obliging him to receive.

ELLIOCK. Sheuchan could not see that Donald was the principal debtor; he might only have been cautioner, and then the assignation would have been unjust.

AUCHINLECK. A creditor may be compelled to assign; but the question here is,—Is he to forfeit his debt because he hesitates upon a point of law? The Court *here* is divided in opinion: Shall we punish a country gentleman for doubting?

On the 19th November 1771, “The Lords repelled the reasons of suspension.” 5th December 1771, adhered.

Act. Ilay Campbell. *Alt.* A. Wight.

Reporter, Auchinleck.

1771. November 20. JAMES SINCLAIR *against* ROBERT ANDERSON and OTHERS.

FIAR.

Where an heritable subject was destined, in a marriage-contract, to the husband and wife in conjunct fee and liferent, and to the heirs of the marriage; whom failing, to the heirs of the wife:—The fee found to be in the wife, though the provision was not gratuitous, but reciprocal, and though nothing else was given in the name of tocher.

[*Fac. Coll.*, V. 328; *Dictionary*, 4,241.]

MONBODDO. The fee was in the wife. There was a land estate in her *in dubio*: it is not to be presumed that she meant to convey it to her husband. Circumstances may create a different presumption, as in the case of *Watson*, 1766. *Here* both the first and the last terminations are to the friends of the wife.

PITFOUR. Both the criteria occur here,—the termination and the original property of the subject. The decisions are not irreconcilable, although the subject proceeds from the wife. The husband is *fiar* if a sum of money *nomine dotis*, expressly or by implication, the husband being *dominus dotis*. *Here* there is another *dos*; all the father-in-law's goods and gear are given to the husband as a *dos*.

JUSTICE-CLERK. I cannot rest my judgment upon that; for, in effect, there were no such *goods* and *gear*. There is no more than a clause of style.

On the 20th November 1771, the Lords "found that the fee was in the wife, and removed the sequestration upon an incidental petition."

Act. J. Scott. *Alt.* Cosmo Gordon.

1771. July 31. ALEXANDER SPENCE *against* THOMAS SMITH.

PROCESS.

A summons, it being sanctioned by the practice, may be called upon the last day of com-
pearance.

[*Faculty Collection*, V. 367; *Dictionary*, 12,001.]

COALSTON. The objection is not relevant. To reduce the adjudication altogether would restrict it to security: here is an obvious irregularity. After the interlocutor was put up in the minute-book, it was not in the power of the Ordinary to touch it. An application ought to have been made to the Court for rectifying this error.

PITFOUR. Lord Milton ought to have signed a note setting forth the *res gesta*.

PRESIDENT. I do not like the putting hands to interlocutors; neither is the second one regular. The day of compearance ought to have elapsed before calling. See FOUNTAINHALL, vol. I., p. 72.

MONBODDO. The day must be past in judicial proceedings, as well as in pursuit for payment of a bond.

AUCHINLECK. The enrolment before Lord Milton was null, and there was no occasion for having it declared null. Interlocutors erroneously signed by one Ordinary, when pronounced by another, are scored daily.

PRESIDENT. That may be the practice; but surely not when the interlocutor is once put up in the minute-book.

On the 31st July 1771, the Lords "sustained the (first) objection, and annulled the adjudication *in totum*;" altering Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Armstrong.

November 21.—PITFOUR. The adjudication is good. Lord Milton's interlocutor was pronounced *per incuriam*. I suppose that Lord Milton scored it upon hearing the mistake. It was pronounced *a non suo iudice*, because the defender was not in Court, the days not being run. Although the interlocutor had not been scored, the proceedings would have been unexceptionable. Suppose a case were remitted to Lord Kennet, and yet brought to me to sign his interlocutor, whether I score this interlocutor erroneously signed by me, or leave it unscored by me, it matters not; for my interlocutor is just so much

waste paper. As to the other objection, it also is frivolous : the summons may be called on the last day of its compearance.

HAILES. Lord Pitfour has not gone to the bottom of the difficulty. He supposes that Lord Milton's interlocutor was *a non suo judice*. I do not see that : as the cause was in his roll, he might pronounce decret. It was the fault of the pursuer, if he insisted in a cause without giving the legal *inducie* to the defender. But, independent of this, the interlocutor, as signed by Lord Milton, had gone to the minute-book ; and I beg leave to deny Lord Milton's power to alter an interlocutor which had gone to the minute-book, or Lord Haining's, to pronounce an interlocutor, as if the former one had never existed. In such circumstances, the remedy does not lie with one Ordinary or another, but with the Court upon petition. As to the other case of an Ordinary signing an interlocutor pronounced by another judge, and then scoring it, *this* does happen sometimes ; but there is no harm done, because his name will go for nothing when the cause is not before him. But, even in this case, it will be found that judges are cautious of scoring, without also marking—*signed by mistake*.

MONBODDO. I do not approve of putting hands to interlocutors. But, suppose that Lord Milton's interlocutor had not been scored, Lord Haining might pronounce a new one, for that the former was null. As to the other part, I am not satisfied : the last day of compearance must be free. The style of decreets bears—*after elapsing of the days of compearance*. For this there are produced authorities as well as principles. As to the practice, *communis error* indeed *facit jus* ; but it is impossible that there can be a *communis error* here.

COALSTON. A laudable desire in the Court to put a stop to slovenly proceedings has carried it too far. When an exorbitant benefit is sought by an adjudication, as in the case of an expired legal, any objection will do. I would restrict this adjudication to a security for principal and interest accumulated at the date of the adjudication. I think that, in strictness, the party ought to appear on the last day of compearance : This is the practice in the Justiciary Court, and ought to be the practice in the Civil Court. It is said that the practice is not uniform ; I therefore would not sustain it. The only consequence of not sustaining calling on the last day, would be to allow the defender to appear and object *de recenti*. The interlocutor pronounced by Lord Milton within the days, was void ; therefore scoring made no difference. An interlocutor signed *a non suo judice*, is useless. My younger brethren speak from speculation rather than practice. I have often scored interlocutors, which I have signed by mistake when the case was not before me : I never knew any petition to the Court for rectifying such errors. Supposing the practice were wrong, it would be hard on that account to cut a man out of his just claim upon so great a dead sum of interest. As to going to the minute-book, *that* makes no difference : *that* will not validate a null interlocutor.

KATMES. Both objections are good for nothing. Scoring is frequent whenever an error is observed. The Civil Court is with continuation of days ; not so the Criminal. This shows why there is a difference between them.

AUCHINLECK. I have ever thought that forms were just the handmaids of justice. (But if justice goes abroad without her handmaids, she will run the risk of being insulted and trod under foot.) As to calling on the last day, *that*

calling is now by the clerk, without the presence of a judge. It is a piece of form, and there is no harm done. An Ordinary signing by mistake for another, is frequent. It matters not whether such interlocutor is scored or no, or by whom it is scored. Here the party went *brevi manu* to Lord Haining, without letting him know of the scoring: This of no consequence; for, if the fact had been set forth in a minute, Lord Haining would have proceeded just as he did. In an expired legal, I should have had more difficulty.

MONBODDO. If it is common to put up protestation on the *first* day after compearance, as I understand the practice to be, then the calling may be on the last day of compearance.

BARJARG. Without form we can have no justice. I cannot get over the difficulty of an interlocutor scored after it had gone to the minute-book.

On the 21st November 1771, the Lords "restricted the adjudication to a security for principal and interest accumulated at the date of the adjudication;" varying their own interlocutor of 31st July 1771, as well as Lord Auchinleck's interlocutor.

Act. G. Wallace. Alt. D. Armstrong.

1771. November 22. JOHN MACADAM of Craigengillan and OTHERS *against* WILLIAM MACILWRATH and OTHERS.

BANKRUPT—Act 1696, c. 5.

The apprehension of a Debtor, and his being in custody of the Messenger upon a caption, held to be imprisonment within the meaning of the Statute.—Effect of an Act of Warding.

[*Fac. Coll. V. 331; Dict. App. I.—Bankrupt, No. 8.*]

PITFOUR. It is not necessary to determine upon the effect of the Act of warding. Here Allison was in the *custody* of the messenger upon the caption: this is just the case of *Woodstoun*, determined in the House of Peers. Something, however, may be urged for the effect of an Act of warding. The Act 1696 meant to make notoriety the rule. It is true that the decision in the case of *Bent's Creditors*, goes the other way; but *there* a disposition to trustees, for the behoof of creditors, was in the field; and such dispositions, at that time, were considered exceedingly favourable, however they may have been considered since.

MONBODDO. If the cause rested upon the act of warding, I should have difficulty. I do not think that an act of warding produces such notoriety as a horning and caption; neither do I think that this act of warding was ever executed. Diligence by horning and caption, and apprehending by messengers, are sufficient to establish bankruptcy. So it was determined by the House of

Peers in the case of *Woodstoun*. The caption was never discharged: Allison was never a man of credit after it.

HAILES. It is unnecessary to inquire into the effects of an act of warding, for here there was none such. The supposed execution in effect bears, that the officer did not touch Allison by reason of his bodily distress. He ought not to have conveyed him to prison; *that* would have been an inhuman action meriting punishment; but neither ought he to have left him at full liberty: He ought to have taken the middle course, put him in the hands of some of the people about him, and returned the *res gesta* in his execution. As to the other point, I do not see the difference between this case and that of *Nisbet of Dirleton* joined to that of *Woodstoun*.

KENNET. The caption was never discharged, and therefore this case is the same with that of *Woodstoun*. The act of warding is not of the same notoriety with the alternatives in the statute 1696.

PRESIDENT. I do not think that the act of warding is sufficient, for that does not operate beyond the narrow territory of the magistrate who issues it. Besides, Allison was not apprehended upon that act: the officer left him in no custody at all. This question, upon act of warding, decided formerly.

PITFOUR. Admitted the weight of the President's observation, upon the narrow territory over which an act of warding is effectual.

On the 22d November 1771, "The Lords sustained the reasons of reduction, upon the Act 1696, in respect that Allison had been apprehended upon a caption; that the caption was not discharged, and that the insolvency was sufficiently proved."

Act. A. Lockhart. *Alt.* G. Wallace.
Reporter, Auchinleck.

[The President wished to have the question put upon the act of warding also; but Lord Coalston objected to the determining a point not necessary, as there was no difference in opinion upon the other.]

1771. November 27. ALEXANDER MACLATCHIE *against* MARY BRAND.

WITNESS.

Objection of Partial Counsel.

[*Faculty Collection*, V. 334; *Dictionary*, 16,776.]

IN a reduction on the head of deathbed, the defender cited Archibald Malcolm, town-clerk of Dumfries, the writer of the deed, and an instrumentary witness to it. The pursuer OBJECTED,—That Malcolm could not be received as a witness, for he had acted as doer for the defender,—had suggested what

questions were fit to be put to the witnesses, and had informed Mary Brand's doer in Edinburgh, what evidence he himself could give. His evidence was taken to lie *in relentis*; and the question ensued, whether the deposition of Malcolm should be opened and made a part of the state?

AUCHINLECK. I have always thought that, as we must judge from the testimonies of witnesses, it is necessary that witnesses should be disinterested: *the giving partial counsel* is a strong objection, and *here* strongly proved.

MONBODDO. The defender has done great injury to her cause by employing Malcolm as her agent; for the opposition made to the receiving his evidence shows that it is material for the defender.

PITFOUR. The judgment in the House of Lords, in *Dickie's* case, did not mean to impugn the general principle: *there* the evidence of the witness was absolutely necessary for proving the execution of the deed.

KAIMES. I should have had great difficulty in admitting Malcolm, even if he had not acted as agent, for he is under the necessity of supporting the deed, in order to support his own good name.

HAILES. The last reason moves me not: It is established in practice, that they who assist ministerially in the execution of a deed, may be examined as to the circumstances attending its execution: this happened in the case of *Mrs Trotter*, and many others. I think, however, that the evidence of Malcolm cannot be received. If one acts with propriety in the character of an agent or of a witness, it is enough. No one is called to act in *both* characters. Malcolm was an agent as long as he could. When he found that his evidence, as a witness, was necessary or fit, he ceased to be an agent; at least he declined acting openly in that character, and observed that it was not right that he should be much seen: This is saying, in other words, as long as I can, I will draw the emoluments of an agent, and, when I can do that no longer, I will change my character, and become an excellent witness. If the defender suffers by losing Malcolm's evidence by his own fault, she may insist against him for damages, as she may be advised.

JUSTICE-CLERK. It would be dangerous to hold that instrumentary witnesses ought to be set aside, because an objection is moved to the fairness of the deed. I am clear that Malcolm cannot be received, for he has given partial counsel. *Here* a man, bred to the law, is conscious that he is doing an act contrary to law: we therefore judge against Malcolm according to his own opinion.

PRESIDENT. The only plea is, that he is a necessary witness; *that* is not good, because the defender made him necessary by having the deed executed privately. The defender has cast Malcolm, by using him as an agent. Were it not for this, I would not cast him. The objection, however, of his share in the transaction might go to his credibility. I hope that Malcolm has not been urged by partial counsel: If he has, it will be odd; but, as his evidence will remain for ever unknown, we have no concern in this.

On the 27th November 1771, "The Lords sustained the objection, and appointed the examination of Malcolm to be cancelled."

N.B.—This altered on appeal, 22d March 1771, without law or necessity.

Act. J. M'Laurin. Att. H. Dundas.

1771. December 4. MRS FRANCIS AGNES WALLACE, and HUSBAND, against JOHN, EARL OF STAIR.

TEINDS—PROCESS.

A decree of Locality, in respect it had been pronounced in absence, and that an error had been fallen into, and a wrong done, reduced.

[*Fac. Coll.*, V. 335 ; *Dictionary*, 12,213.]

MONBODDO. The question is, Whether is the allocation to be sustained after the expiry of the tack? I do not see how this can be. The case of a wadsetter put by the defender, is not in point; for a wadsetter is proprietor for the time, and, if no order of redemption is used, may be proprietor for ever. *Here*, the tack being expired, there is an end of the tacksman's exemption of his own lands.

PITFOUR. In 1693, when the law gave the same privilege to tacksmen and to titulars, most of the tacks subsisting were for a great number of years yet to run. They had been granted about 1618, to endure from seven times nineteen years to ten times nineteen years. The right of property, after the expiry of such tacks, was a mere trifle, perhaps two or three years' purchase: but when a tack is either *de facto* expired, or within a few years of expiring, so that its end is within sight, no reason can be assigned for giving the tacksman a power of perpetual allocation. While a long tack subsists, it matters not in which way the allocation is made. It is just the question, "Whether shall I take the money out of my right or out of my left pocket?"

AUCHINLECK. Here is a reduction of a decret of this Court: The question is, Can that decret be got the better of? I think it can; 1st, Because the decret was in absence; 2^d, Because the rent of the pursuer's lands was grossly overstated; 3^d, Because the allocation is of the lands, as belonging to a person who had no right whatever in them. If the decret be once set aside, we must local anew, and then, the tack being expired, all are *in pari casu*. I would have been clear, if the short term of the tack had been stated, to have sustained the objection, even in the former locality.

COALSTON. The pursuers are not tied by the decret; but I think that the pursuer must also prove injustice in the locality; for, if no injustice, why set the locality aside? The consequence of overturning this locality, may be to overturn all localities pronounced by this Court. A distinction has been made between the consequences of long tacks and short tacks; but *where* is the line to be drawn? In many cases, one, having but a temporary right, may create a perpetual right.

KAIMES. It is the Court which establishes the locality, not the tacksman. If the Court establishes a perpetual locality, it will be good, whatever the right of the tacksman may have been. This will solve one of Lord Coalston's diffi-

culties. In such case the heritors who objected not *sibi imputent*: Their plea is competent and omitted; but here the decret is void and null for want of parties. The Court must begin *ab ovo*: there is now no tacksman; all are *in pari casu*.

PRESIDENT. We cannot both set aside the decret and rectify it.

On the 4th December 1771, "The Lords sustained the reasons of reduction."

Act. W. Wallace. *Alt.* D. Dalrymple.

N.B.—The question of the power of a tacksman to allocate, whether the term of his lease to run was long or short, did not receive a determination, nor could it in the present shape of the process. I have, however, set down the opinions of the Judges as pointing at the ideas of the Bench.

Diss. Coalston.

1771. December 6. BOYD PORTERFIELD of Porterfield, against JOANNA, MARRION, and SILIAS PORTERFIELDS.

PREScription—TAILYIE.

An obligation to execute an entail cut off by the Negative Prescription.

[*Faculty Collection*, 340; *Dictionary*, 10,698.]

PITFOUR. The obligation, by Hapland, is in 1716, "Sicklike, I bind and oblige me, and my foresaids, to make an destination and tailyie, that, failing of me and heirs-male of my body, the lands and estate of Hapland, or what parts thereof I shall happen to acquire, is wholly to accresce to the said Alexander Porterfield and the heirs-male of his body." Nothing was done upon this deed till 1768. It is lost by negative prescription. The course of the prescription would not be stopped by the estate continuing in Hapland's male descendants, because Alexander Porterfield was *non valens agere cum effectu*. But, here, from the very moment of the deed, Alexander Porterfield might have called upon Hapland to execute an entail. If he neglected this for 40 years, his claim is lost.

COALSTON. Doubted as to negative prescription, because Alexander Porterfield could take nothing by it.

On the 5th December, 1771, the Lords sustained the defence of negative prescription, (and also the other defences;) adhering to Lord Monboddo's interlocutor.

21st December 1771, adhered.

Act. J. Swinton, junior. *Alt.* A. Lockhart.

Diss. Coalston, as to prescription.

N.B.—The other defences in this case were so involved in fact, that it would serve no purpose to state the reasonings of the Lords upon them.

1771. December 5. ELIZABETH PRIMROSE *against* ROBERT CRAUFURD.

COURTESY.

The right of the husband sustained over the lands which the wife had got by a disposition, but in which she was *alioqui successura*, and held to have acquired *præceptione hæreditatis*.

[*Faculty Collection*, V. p. 345 ; *Dictionary*, Appendix I. ; *Courtesy*, No. 1.]

PITFOUR. There is a decision, not in the Dictionary, but observed by Forbes, 12th December 1712, *M'Cauly of Arncliffe*, which determines that provisions in a marriage-contract do not exclude the *jus relictæ*. A point settled so long ago, as to *jus relictæ*, will not be unsettled now. The same rule applies to *courtesy*. Many opinions have been given by lawyers of eminence : many judgments, in the Outer-House, have been pronounced and acquiesced in upon the footing of the decision of *M'Cauly*. It is a fixed point, that courtesy extends not to conquest. The reason of this may possibly be found in the civil law, whence we derived the courtesy ; but, be that as it will, *servate terminos quos patres vestri posuere* : it is certainly a part of our consuetudinary law. As to the present question, there may be *heritage* when there is a *præceptio hæreditatis*. If a father disposes to three daughters, they will be liable *passive* for his debts. In so far as the wife, *here*, took *præceptione hæreditatis*, will the husband take by courtesy. I also think that the wife's holograph deed will be effectual, although some of the subjects mentioned in it are not mentioned in the marriage-contract. The holograph deed was rational. I doubt how far she could alter it : it must be proved to have been executed *in liege poustie*.

GARDENSTON. The marriage-contract might be, in so far, in implement of the holograph deed, as it contains subjects mentioned in the holograph deed. But its omitting any subjects will not invalidate the obligation in the holograph deed.

HAILES. The nature of this holograph deed is misunderstood : it expressly relates to a contract to be extended, and contains a warrant for extending such contract. The contract followed, and was regularly signed by the parties. From that time its warrant must be held as out of the question. The husband cannot plead upon the warrant, while the deed itself, made out in consequence of the warrant, exists. If the last deed contains fewer particulars than the first, *that* must be imputed to a change of will in the parties ; for it is impossible to suppose that the parties themselves did not know the one meant to *give* and the other to *receive*.

JUSTICE-CLERK. If there had been first a formal deed conveying the whole lands, and then a marriage-contract, conveying only a part of the lands, there might be a doubt of the marriage-contract vacating the formal antecedent deed; but this is not the case *here*: The first deed was informal, and the marriage-contract must be considered as the final declaration of the will of the parties. It is impossible that any error could have happened by the mistake of the writer; for both parties knew the extent of the subjects, and must have been possessed of the rights of the one parcel as well as the other. All the reasoning which applies to the right of courtesy in heritage will apply to *præceptio hæreditatis*. The husband ought not to be in a worse situation than if the subject had descended as heritage.

COALSTON. The holograph deed goes upon the narrative that a marriage-contract had not been executed. Afterwards, a marriage-contract was executed: that must be the rule. As to the question of courtesy in the case of *præceptio hæreditatis*, I see no difference between succession by *præceptio* and by service. In a matter arbitrary, like this, the opinion of writers is of great weight with me: In this question, both Lord Stair and Lord Bankton agree.

KAIMES. It is very dangerous to alter a marriage-contract in consequence of any prior declaration of will concerning a marriage-contract. There is no difference between succession in heritage by service or by *præceptio*. What we call *præceptio*, is only a method devised to save expense.

On the 5th December 1771, "The Lords found that the husband was entitled to the courtesy of the lands to which the wife succeeded *præceptione hæreditatis*; but found that no action lay on the holograph deed;" varying Lord Kennet's interlocutor.

Act. J. M'Laurin. *Alt.* R. M'Queen.

Diss. As to holograph deed, Gardenston, Pitfour.

1771. December 5. THOMAS and ANDREW SORLIE against ELIZABETH ROBERTSON.

JUS RELICTÆ—HUSBAND AND WIFE.

Power of the husband over the goods in communion does not authorise him to execute a deed, with the evident design of disappointing the relict's legal claims.

[*Faculty Collection*, V. p. 338; *Dictionary*, 5947.]

PITFOUR. I understand the deed to have been delivered, and irrevocable; yet I think that the wife cannot be deprived of her legal provisions and beggared by this device.

PRESIDENT. The deed was gratuitous, obviously and avowedly calculated to defeat the widow's claim.

HAILES. I add, proceeding upon a false narrative of an obligation in which the husband was not really bound.

MONBODDO. This deed is, in so far, a testamentary deed, that it does not take place till after the death of the granter; at the same time, it is not a testament because irrevocable: but it is a gratuitous deed, and must come off the dead's part. A man cannot be allowed to make deeds of this kind, to the effect of impairing the legal claims either of wife or of children.

KAIMES. I can conceive many deeds not to take place till after death, and having an obligation of warrandice, and yet good against the wife; *this* is one of the few cases of civil right where intention is to be considered: the intention was not so much to honour the brother as to disappoint the wife. The cloven foot appears throughout.

On the 5th December 1771, "The Lords found that the deed can only affect the dead's part."

Act. D. Græme. Alt. D. Smyth. Rep. Pitfour.

1771. December 10. WILLIAM and HENRY KNOX, &c. *against* WILLIAM LAW of Elvingston.

FIARS.

The mode of striking the Sheriff-fiars of the county of Haddington, and a reduction of them as erroneous, and as not in terms of the Act of Sederunt, 24th December 1723, dismissed.

[*Fac. Coll. V. 349; Dict. 4420.*]

KAIMES. Without entering into the merits of the cause, I rest my opinion upon the preliminary point, that the pursuers have no title to reduce the fiars, and that they are barred therefrom *personali exceptione*. Messrs Knox, merchants in Dunbar, could not fail of knowing that the sheriff was wont to strike the fiars by a particular rule, and without the interposition of a jury. Their correspondents in Glasgow could not fail of being informed of this: They also knew that the fiars in East Lothian were higher in 1768 than those in Mid-Lothian,—as 13s. 4d. to 11s. 8d. In such circumstances they bargain by the East-Lothian fiars, which they knew were to be struck without a jury, and which, *they had reason to believe*, would be considerably higher than those of Mid-Lothian. It comes out, that, in fact, the difference between the fiars of the two counties was not so great in 1769 as in 1768, and yet the pursuers, contrary to their express obligation, seek to set aside a rule which they knew would be followed at the time of entering into that obligation.

MONBODDO. Although I were convinced that the rule followed by the sheriff was absurd, I should still hold the pursuers bound, for they must have known the rule.

KENNET. Both buyers and sellers knew the rule, and must have contracted according to it.

KAIMES. Here there is an explicit bargain, according to the fiars, and yet the pursuers will not pay according to the fiars.

PRESIDENT. I doubt as to reduction of fiars at all. There is a strong judgment to that effect, 5th August 1760, in an action against the town of Aberdeen. This case is still stronger; for the purchaser here knew how the fiars were to be struck. When the method prescribed by the Act of Sederunt has not been in observance, I do not think that an established method can be set aside.

AUCHINLECK. Fiars were instituted chiefly for ascertaining the king's duty. In process of time, indifferent persons chose to sell and buy according to the fiars: *here* the agreement was for the *highest fiars*. This shows that the pursuers did then understand that there were *higher* and *lower* fiars, though now they argue the contrary.

PITFOUR. When a jury judges, the evidence must perish in part; for their judgment may be influenced by private knowledge. When a single man judges upon evidence openly taken, that evidence remains. We do not gain so much by the jury's knowledge as we lose by its bias, either for the seller or for the buyer.

COALSTON. The pursuers are barred *personali exceptione* from objecting. I think that the method taken by the sheriff is better than that prescribed in the Act of Sederunt; because a jury may act from private knowledge, and then the Court cannot review its judgment; but I would not determine the general question, as that would run contrary to the Act of Sederunt.

PRESIDENT. I have great respect for Acts of Sederunt; but this has not been established by practice: and, if it is thought erroneous, why enforce it.

On the 10th December 1771, "The Lords found the pursuers barred *personali exceptione*; and separately, upon the merits, repelled the reasons of reduction:" (adhering in substance to Lord Auchinleck's interlocutor.)

Act. A. Lockhart. Alt. H. Dundas.

As to the personal exception, unanimous. As to second point—

Diss. Kaimes, Coalston, Barjarg, Stonefield, Hailes.—They declined giving judgment on the sheriff's method of striking the fiars.

Absent, Strichen, Alemore, Gardenston.

1771. December 18. ADAM WILSON and OTHERS *against* DAVID JOBSON.

TITLE TO PURSUE—SOCIETY.

An action, sustained at the instance of a majority of private individuals, who had united themselves for religious purposes, into a society called the Antiburgher Associate Congregation of Dundee.

[*Faculty Collection, V. 354 ; Dictionary, 14,555.*]

COALSTON. Any number of men may enter into society for all lawful matters, and may act as a copartnery; but I doubt how far they can associate themselves into a corporation with a perpetual succession. Royal boroughs are corporations aggregated, in the language of the law of England. What are we to understand to have been the congregation? I do not see evidence of what it consisted. We see the contributors; but there may have been members of the congregation who were not contributors. This case is not so narrow as *Gibb's* case; for *there* the right was in subscribers who were known: *here* in a congregation of which we see not the members.

PITFOUR. In this case action lies: there is no body-corporate, but we must enforce *bonam fidem*. A trustee who has undertaken a trust must fulfil it. Individuals who are no body-corporate may acquire a subject in name of a trustee. *Here* a description used of congregation, which is sufficiently explicit.

AUCHINLECK. I never heard of any society which professed to hold that a man might violate his trust. The pursuers are a majority of the original society, and therefore have a title to declare the trust.

HAILES. The pursuers assume a style which a court of law cannot acknowledge:—"Commissioners constituted by the associate congregation of Dundee, subject to and under the inspection of the Associate Synod, and other judicatories, in a regular subordination through Scotland." This sounds odd. I know of no judicatories ecclesiastical but those in the Church established by law. I do not see evidence that the pursuers are a majority of the original society. There must have been many persons who were of the congregation, though not contributors,—persons, who, from conscientious scruples, seceded with empty purses. There is no difficulty of knowing *who* were the members of the congregation: they who partook of ordinances under the ministry of Mr Scott. His roll of communicants in 1764 will go nigh to ascertain this with the utmost exactness.

PRESIDENT. The name which the pursuers assume cannot be admitted: that must be struck out. I never liked the decision in *Gibb's* case. Unless Jobson will show that the pursuers are a minority, from my wish to support trusts, I will hold them to be a majority.

JUSTICE-CLERK. Jobson was trustee for the congregation. It is ascertained

that the pursuers are the majority of the congregation : he must therefore discharge the duty of trustee and denude.

On the 13th December 1771, "The Lords ordained the denomination which the pursuers give themselves, to be expunged ; and, in respect the defender has admitted, in his deposition, that he understood the right of the meeting-house in question to be a trust in his person, for behoof of the congregation, at the time of the trust, and that it appears that the pursuers, with those that concur with them, were a majority of that congregation at the time of the trust,—sustained the pursuers' title to carry on this action ; and found that the defender is bound to denude himself of said trust, in their favour, upon being reimbursed of the money laid out by him whereof he is not already indemnified."

Act. A. Lockhart. *Alt.* R. M'Queen.

Reporter, Monboddo.

Diss. Coalston, Hailes, for the reasons assigned in their opinions, but no vote was put.

1772. January 16. JOHN ADAM and WILLIAM SHAW *against* JOHN ALSTON and WILLIAM FLEMING.

PROCESS—ADVOCATION.

Defender's claim for expenses incurred in a successful opposition to a bill of advocacy at the pursuer's instance, ought to be made in the original action still pending, and not by a separate one, though before the same judge.

[*Fac. Coll.* VI. 1 ; *Dict.* 12,239.]

BARJARG. When a bill of advocacy is refused, the proceedings on it may be considered as a branch of the proceedings before the Sheriff, and the expenses incurred concerning it may be properly given by the Sheriff. I have more doubt as to the expenses in a bill of suspension.

COALSTON. Any expenses incurred before the Sheriff may be awarded in the original process. As to expense of bills of advocacy, most just that there should be indemnification. The practice is not uniform. A general regulation is necessary. Cannot blame the parties for going before the Sheriff.

KENNET. Here there was a depending action. The new action was irregular. How far the Sheriff could give the expense of a bill of advocacy, cannot be tried here. If the new action is incompetent, I should think that in the old action the Sheriff might have given expenses.

JUSTICE-CLERK. I do not like Acts of Sederunt where common law is sufficient to give remedy. It is wrong to present a groundless advocacy. There is no wrong without remedy. The Ordinary on the Bills, by remitting to the

Sheriff to give expenses, does nothing unless the Sheriff has in himself a jurisdiction. The law does not encourage unnecessary processes. The expense here ought to have been asked in the original process.

KAIMES. Every Court should determine as to the expense incurred in that Court. The rule applies not here, for the process was never in this Court. On the contrary, it was, in effect, found that the cause ought not to have been removed into this Court.

AUCHINLECK. Supposing the bills of advocacy to have been frivolous, redress is due. I think that the Court ought to remit with an instruction as to expense, because this Court is the proper judge of the expense, the nature of which it has seen.

PITFOUR. I have no difficulty as to the power of this Court to remit with an instruction to give expenses. There may, however, be cases where a bill is refused, and yet expenses not to be awarded.

JUSTICE-CLERK. True; and therefore the Ordinary on the Bills ought to have the power of determining and taxing expenses, when a bill is refused.

On the 16th January 1772, the Lords found the new process not competent, reserving to the pursuer to insist in the original process before the Sheriff.

Act. Ilay Campbell. *Alt.* J. M'Laurin.

Reporter, Kennet.

1772. February 5. MR JOHN ARBUTHNOT *against* JAMES COLQUHON.

TACK—PERSONAL AND TRANSMISSIBLE.

Clause in a Tack, that the tenant, at his removal, shall be paid the expense of inclosing, effectual against a singular successor in the land.

[*Fac. Col. VI. 5; Dict. 10,424.*]

GARDENSTON. This precise question was determined in favour of the purchaser, as the Ordinary has determined it, *December 1760, M'Dowal of Logan against M'Dowal of Glen*. I was lawyer on the losing side, the Ordinary on the winning; but I thought the decision erroneous.

MONBODDO. The decision in 1760 is certainly erroneous. A purchaser has a right to exact rent from the tenants, although the tacks are not assigned. He must therefore perform every intrinsic obligation in the tacks, though not extrinsic. Suppose the lease to last 900 years, would you deny action against the purchaser and his heirs, and oblige the tenant to seek his relief from the heirs of the seller? If this interlocutor stands, no tenant will ever improve his farm, for he will have no security for improvements bestowed, although there be a provision in the contract of lease to that effect.

COALSTON. If a purchaser has the benefit of tacks, he must undergo their

burden. Obligations to uphold houses, to furnish great timber, to bear the joint expense of maintaining fences, are all usual obligations on the proprietor. If they do not pass as obligations on the purchaser, a tenant has no security. A high rent is often stipulated upon the proprietor becoming bound to furnish lime. In such case the purchaser would be liable.

AUCHINLECK. If the seller becomes bankrupt, what will become of the tenant?

PITFOUR. When a contract is mutual, and the prestations are not divisible, the assignee comes in the place of the original obligant, and must take the contract as it stands. There is indeed a difference between clauses in a tack which are intrinsic and those which are extrinsic. A clause essential *ad bene esse*, though not *ad esse* of a tack, may be held intrinsic.

On the 5th February 1772, the Lords found Sir James Colquhoun, the purchaser, liable to perform the obligation in the tack; altering Lord Hailes's interlocutor.

Act. J. Douglas. Alt. J. Colquhoun.

1772. February 11. ROBERT M'NAIR, Merchant in Glasgow, *against* JOHN COULTER and OTHERS.

INSURANCE.

Valued Policy.

JUSTICE-CLERK. A valued policy is, when goods are specified, as so many hogsheads or bales. We are not to inquire judicially as to the quantities shipped; but still there must be a value. We cannot value £2000 upon a cable. This would be contrary to the spirit of the statute, 19th Geo. II. I will not suffer myself to be misled by any reference to the opinion of a judge (Lord Mansfield) in a case quite different from the present case. Insurers will never ask more evidence than a fair bill of lading: but there is no such thing here. There is much evidence to the contrary. It is probable that the vessel did not contain, and could not contain, the quantities specified in the bill of lading. I doubt whether the prime cost of the qualities proved, or the value at the port of destination, ought to be the rule.

KAIMES. I have no notion of a valued insurance here. The bill of lading is so false that no credit can be given to it. M'Nair, the person insured, must prove his damage. I doubt whether Hood's invoice, and the naval officer's certificate, are sufficient to prove the damage.

AUCHINLECK. There was no valued insurance; for neither the insured nor the insurers knew what was on board. We cannot depend upon the bill of

lading. We must then take the only evidence that remains. I would rest upon the certificate as a probative writing.

GARDENSTON. I still incline to think that *here* is a valued insurance. If the value proved is near the value insured, every thing was fair on the part of old M'Nair. Had the ship come to port, the premium would have been exigible, and no inquiry would have been made as to the value.

KAIMES. The father is not to blame for his son's offence, but he must not profit by it. The son's fraud is proved, so that there is no necessity of recurring to other evidence.

GARDENSTON. Suppose that I insure a value of £1000, there is some evidence that the value was greater, some that it was less. This, the case here, very different from an elusory value, which is gaming.

PITFOUR. Here a valued policy, unless an exorbitant excess appears.

ELLIOCK. Here a valued policy. If M'Nair had, *bona fide*, value on board, it would be good. It is not sufficient to object that the cargo was not just equal to that value. If you hold otherwise, you will make place for endless lawsuits. If there is a gross overvalue, the policy may be set aside.

On the 11th February 1772, the Lords found that M'Nair is not entitled to his full insurance. That the certificate must be the rule as to quantity : Hood's invoice as to value. That the real sum recovered by Smith must be deducted. They also allowed him the value of the freight and charges, and interest from the date of the Admiral's interlocutor.

Act. J. Swinton, jun. *Alt.* R. Cullen, &c.

Reporter, Auchinleck.

Diss. As to first point,—Gardenston, Barjarg, Ellick, Stonefield.

Reversed on appeal.

1772. February 14. SIR JOHN SINCLAIR *against* JAMES BRODIE of Brodie.

SUPERIOR AND VASSAL.

Title to insist in a reduction of a decree of tinsel of superiority and casualties thereof.

[*Faculty Collection*, VI. 11 ; *Dict.* 15,082.]

COALSTON. Where a superior remains unentered, the vassal must have a remedy ; for, until he obtains a charter, he can neither remove tenants nor burden his estate. Here the requisition is not proper, being a charge to enter to the predecessor not the last infeft. This objection would be good at the instance of the heir-of-line. But Brodie is not heir-of-line ; he is nothing more than a creditor.

KAIMES. I cannot discover what interest Brodie has to move the objection.

JUSTICE-CLERK. There is an extraordinary defect in the law of Scotland if a vassal shall not have it in his power to procure a title to dispose of his estate.

At present Brodie has no more title than I have ; but he says, " Wait till creditors are ranked, and then you shall have an entry."

ELLIOCK. All that Brodie can claim is, to be reponed against the decret, in so far as he himself is concerned. But *that* will not entitle him to plead in the character of the heir-of-line.

On the 14th February 1772, the Lords found that Brodie had no title to move the objection, and decerned ; adhering to Lord Stonefield's interlocutor.

Act. R. M'Queen. *Alt.* Cosmo Gordon.

1772. February 18. HENRY DAVIDSON of Tulloch *against* SIR HECTOR M'KENZIE and his CURATORS.

TUTOR AND CURATOR—*SOLIDUM ET PRO RATA.*

A single curator may interpose for the evident utility of the minor, although, by the nomination, the right of acting be vested in the majority who dissent.

[*Faculty Collection*, VI. 13 ; *Dict.* 14,705.]

AUCHINLECK. The question is, Whether there was a completed bargain with Sir Alexander M'Kenzie ? According to the entail, a sale was only allowed when the estate came to be affected by adjudication or otherwise : there was no adjudication here. The minor and one of his curators oppose the sale : the curator offers to furnish the money and pay the debt : this is sufficient. If the other curators oppose this, we can remove them as suspect.

GARDENSTON. Sir Alexander M'Kenzie had no power to sell the estate unless *causa cognita*.

PRESIDENT. The sale would have been valid against Sir Alexander M'Kenzie : but Sir Hector does not represent him. Without an adjudication there can be no sale. How can there be an adjudication if Sir Hector is willing to pay ?

On the 18th February 1772, the Lords found that Sir Hector M'Kenzie is not bound to sell, in respect he does not represent Sir Alexander ; and found Sir Hector entitled, upon payment, to stop the constitution of the debts in Mr Davidson's person.

8th July 1772, adhered.

Act. H. Dundas. *Alt.* Ilay Campbell.

Reporter, Monboddo.

1772. *February 20.* ALEXANDER HOUSTON and COMPANY *against* CLAUD and CHARLES STEWARTS.

BANKRUPT.

An heritable security granted by a debtor, bankrupt in terms of the Act 1696, found not to fall under it, as being in consequence of an anterior obligation, coeval with the contraction of the debt.

[*Faculty Collection, VI. 14 ; Dictionary, 1170.*]

COALSTON. The Act 1696 does not strike against a disposition in consequence of antecedent obligations. *Here* there is strong evidence of an antecedent obligation. In support of this, I would allow a proof by witnesses who know the matter, and are not interested.

PITFOUR. I doubt much of the point of law, though it has been once determined, *Watson against Arbuthnot*, summer 1769. An antecedent obligation is good against inhibition, but not against bankruptcy. An actual formal security granted before bankruptcy is good for nothing, if security is not given till after bankruptcy. Shall we say that an obligation to dispoise is of more weight than an actual disposition ?

MONBODDO. I also doubt of the general point ; but that is not argued in the petition and answers. I doubt how far the latter case can be authenticated against the creditor.

PRESIDENT. Witnesses are not offered to prove the obligation, but to prove facts whence an obligation may arise. Suppose the papers had been put into the hands of a writer, and he had died suddenly ; in such case the proof would have been allowed. This shows that there is no general rule against allowing such proof.

PITFOUR. It is on account of the lubricity of the memory of witnesses that they are not receivable as to *words* spoken. But there is a great difference as to proving *facts* which are not liable to mistakes.

On the 24th January 1771, the Lords, before answer, remitted to the Ordinary to examine Baine and Blackstock as witnesses, and to proceed in the cause accordingly ; altering Lord Kennet's interlocutor.

Act. R. Cullen. Alt. J. M'Laurin.

February 20.—COALSTON. There is satisfying evidence that it was communioned and agreed on that the creditor was to get heritable security, and that the money was advanced upon that footing. Had the obligation to grant heritable security been afterwards given, it would have made a difference.

GARDENSTON. Although there was such a communing, yet there is no legal document of an obligation to be granted. Were this security effectual, the consequences would be dangerous. Even an express obligation to grant a security will not be sufficient: the heritable bond itself would not be sufficient. An heritable bond, without infestment, is personal as to creditors: It is the seeing a burden upon record which alone puts them on their guard.

PITFOUR. The reasoning of Lord Gardenston is good, but applies not to this case. The Act of Parliament does not reach to this case. The law meant to give a salutary remedy against every partial deed in favour of any creditor. Had it meant to go farther, the retrospect would have been intolerable. The law did not mean to interrupt the course of common transactions. There was a *novum debitum* here, no matter at what time contracted. Were there here an *antiquum debitum* and a security, the case would be different. The case of *Kellar's Creditors* impinged a little upon these principles; but that is a single decision.

MONBODDO. The statute relates to anterior debts: But would the anterior creditor have had any preference had it not been for the heritable bond? The Act, at this rate, may be eluded.

AUCHINLECK. All depends upon the Act of Parliament. It provides, in plain words, that it shall not be in the power of the debtor to give a preference to any of his creditors within 60 days of the bankruptcy. A bill given, *simul et semel* agreed that heritable security should be granted. Here the difficulty: Could the person who got that obligation have had any preference without the heritable security? Were this preference sustained, it would be in the power of debtors to postpone and prefer creditors.

PRESIDENT. The obligation is to be considered as an heritable bond of that date. The lateness of the infestment varies not the case.

KENNET. My former opinion in this cause proceeded upon the defect of evidence. In the case of *Cairns* I was clear, because the advancing the money and the heritable bond were *partes ejusdem negotii*. Here it is not just the same case,—for the money was advanced: But then it would not have been advanced, unless upon the stipulation of heritable security.

On the 20th February 1772, the Lords repelled the reasons of reduction.

11th March 1772, adhered.

Act. R. Cullen. Alt. J. M'Laurin.

Reporter, Kennet.

Diss. Gardenston, Auchinleck, Stonefield, Monboddo.

1772. February 27. MRS JEAN CAMERON against THOMAS BOSWALL.

ARRESTMENT.

In a competition between two Arrestments used in the same day, one execution bearing, that the Arrestment was laid on between the hours of six and seven ; the other execution, that the Arrestments were laid on betwixt the hours of seven and eight afternoon: the priority found sufficiently ascertained to decide the preference.

[*Fac. Coll.*, VI. 26 ; *Dictionary*, 821.]

AUCHINLECK. The law always prefers the prior arrestment ; but there is difficulty in determining which is prior. Lord Stair has laid down a rule, that there might be a sufficient time to prevent mistakes as to priority.

PRESIDENT. *Ex facie*, the one arrestment is prior to the other : why should we not proceed upon that *ex facie* evidence until the contrary appears ?

HAILES. Lord Stair speaks of three hours as establishing a preference ; but, in the same place, he speaks of arrestment being preferred according to priority in time. His rule will generally be good : it is like the *biduum vel triduum*, within which, if a purchaser *cedit foro*, a bargain of moveables is vacated. If we do not prefer the arrestment which appears prior in date, we must heap presumption on presumption. We must presume, that the messengers mistook the hour of the evening, and that the watch of the one went too fast, while the watch of the other went too slow.

GARDENSTON. If there is evidence, from the execution, that the one arrestment was prior to the other, we must hold that to be the first till the contrary is proved. Although the numbers one and two are next to each other, they are in fact as distinct as one and a hundred.

PITFOUR. I could have wished that our predecessors had made a day the rule, instead of an hour. I never saw a decision upon a preference of *minutes*. The executions were *bona fide* made, but there is an uncertainty in the time. The Act, 1693, makes a preference depend upon the date of registration. As there are different registers in which a writing may be placed, the Court may be called to determine upon an inquiry into minutes. I think the *minimum* ought to be a full hour.

ELLIOCK. Here is a legal attestation of a fact. I must suppose that the officer of the law has attested a truth. An hour is a fixed portion of time as much as a day.

KENNET. Lord Stair speaks of three hours : perhaps this is too much. Later writers require such a space of time as that it may be certainly known *which* arrestment is prior in date.

On the 27th February 1772, "The Lords preferred Mrs Cameron on her arrestment ;" altering Lord Kennet's interlocutor.

Act. Adam Rolland. *Alt.* R. Blair.

Diss. Kaimes, Pitfour, Kennet, Auchinleck.

1772. February 28th and March 3d. WILLIAM RICHARDSON against MARTIN FENWICK.

ARRESTMENT.

A bill being duly protested for non-payment, found that the registered protest was not a sufficient ground for Arrestment of the drawer's effects, without a depending action; and, in consequence, a posterior Arrestment upon a dependance was preferred.

[*Faculty Collection, VI. 28 ; Dictionary, 678.*]

KAIMES. The arrestment founds a jurisdiction on the effects, so as the judge can proceed to adjudge them to the creditors.

PITFOUR. The only purpose of an *arrestum jurisdictionis fundandæ causa* is to create a jurisdiction on the effects. There must be a separate arrestment for the debt. So it was advised by eminent lawyers in the case of *Alexander M'Kenzie* and *The Swedish East India Company*.

PRESIDENT. After an *arrestum fundandæ gratia*, the party must proceed in the common form, and arrest upon the dependance.

PITFOUR. As to the second question, an arrestment may proceed upon a clear ground of debt; for the purpose of arrestment is to stop the fraud of the debtor.

ELLIOCK. This applies not to the present case. *Here* is an accepted bill. No liquid ground of debt against the drawer.

JUSTICE-CLERK. The question is, Whether a bill, duly accepted and protested for not-payment, can be the subject of arrestment against the drawer? The words in the statute are clear in the negative; and there is a reason for the difference between bills not accepted and bills not paid. When acceptance is refused, there is immediate recourse, because the drawer has drawn upon a person who had not his money; but, when a bill is once accepted, there may lie reasons against recourse, and therefore the law refuses summary executorials.

KAIMES. If the drawer has no objection to the negotiation, there is a clear ground of debt.

COALSTON. It is only from practice that arrestments are allowed upon liquid grounds of debt, without registration or dependance. If this is allowed, the same ought to be allowed here.

PRESIDENT. Practice is of much consequence. There is no practice authorising arrestment against the drawer when bills are accepted but not paid. After a bill is accepted, the drawer is only subsidiarily liable. In such circumstances a drawer may know nothing of the matter, when his whole effects are locked up at once by arrestment, and his credit interrupted, or perhaps ruined.

KAIMES. All diligence, prohibitory or executorial, implies a *mora* in the debtor. Nothing of this here.

On the 3d March, 1772, the Lords preferred Martin Fenwick's; adhering to Lord Hailes's interlocutor.

Act. Ilay Campbell. *Alt.* B. Sinclair.

1772. *March 7.* TRUSTEES Infeft in the Forfeited Estates of Lochiel and Callart, *against* ALEXANDER, DUKE of GORDON.

SUPERIOR AND VASSAL.

Lands held of a subject superior being forfeited and annexed to the Crown, the said superior is not entitled, upon an entry, to demand from the Crown's donatar, or trustee for the Crown's behoof, the composition of a year's rent.

[*Dictionary*, 15,050.]

1771. *December 20.* COALSTON.—It is a point established, that all purchasers must pay a year's rent, in name of entry, before they can claim an entry. What is the case when the king takes by a donatar, or bastardy, *ultimus hæres*? A year's rent is paid by the donatar. Why should not a donatar, on forfeiture, do the same? The analogy is strong. The argument from the case of singular successors is not conclusive; for the similitude of the cases of an adjudger and an appriser is very great; and yet, during a period of two hundred years, a year's rent was prestable by the one and not by the other.

HAILES. The decision 1680, *Lord Montgomery*, shows that at that time a year's rent was not prestable by the donatar of a forfeiture. There is no decision, or authority, either before or since that time, which says any thing to the contrary; from whence then comes the law to be altered? The suspender urges the analogy between this case and that of a donatar of bastardy, or *ultimus hæres*; but, instead of proving an unvaried and general practice, he refers to a few late instances. In establishing a principle by analogy, it is necessary that the principle referred to be constantly and invariably followed. It is bad logic to found a general analogy on single detached cases.

MONBODDO. I consider the Crown as proprietor of the estate by the forfeiture. I have always held that it is an established rule of the feudal law, wherever that law prevailed, that, in the choice of a vassal, there is a *delectus personæ*, and a *delectus familiæ*: hence the superior is not obliged to receive one for his vassal whom he does not like. This was universally the rule till the statute 1469. No privilege was thereby granted to the superior; but, on the contrary, an encroachment was made on his rights. When adjudications came in fashion, not long after 1669, the exception was extended to adjudgers: still the superior was not bound to receive any voluntary disponee. The circuit of an adjudication was necessary to compel him. The adjudication brought the case under the Acts 1469 and 1669. By the Act 20th Geo. II., an easier

method, by a charge, was devised, but still there was a reservation of the superior's right. I can make no distinction between a private person and his trustee, nor between the trustee of the Crown and the trustee of the private person. If I had any doubt, it is removed by 25th Geo. II., where a distinction is made between the first trustees and *after trustees*. And it is provided that *after trustees* shall not pay any entry. *There* a composition was in the eye of the legislature, and yet it gave no hint that a composition was not due. With respect to the decision 1680, the law of forfeiture stands upon a different footing *now* from what it did *then*. At that time neither vassals nor creditors were secured, but the Act 1690 ensued. It proceeds upon the principle that an innocent person shall not suffer for the fault of the guilty. I cannot distinguish between the case of presentation upon forfeiture and a gift of *ultimus hæres* and bastardy.

JUSTICE-CLERK. I am not clear what is the principle as to paying a composition in the case of *ultimus hæres* or bastardy. Some private people may have paid a composition, perhaps from ignorance, perhaps from a desire of avoiding law questions; but what I desiderate, is either universal practice or decisions. Be that as it will, I go no farther than the case before me. It is dangerous to resort to principles of analogy. Our predecessors, and the legislature itself, did not resort to those principles where the similitude was express, as in the case of adjudications and apprisings. The decision 1680 is express; there is no decision to the contrary. As to the Act 25th Geo. II., there was great equity in providing nothing upon the subject by that statute. The statute left that matter to the decision of the law. But it added a clause to this effect,—That, if the law shall find the superior entitled to an entry, he shall not be entitled to an entry as often as the Crown shall vary the trustees.

KENNET. There was no purchaser *here*; this is the same case which happened in other rebellions: when the Crown presented a donatar, a year's rent was not due. When a vassal sold the feu, the superior was not bound to give an entry. In the case of forfeiture, there is no reason for giving a year's rent, for the superior is bound to give an entry. The Revolution made no alteration in the law as to this point: the Act 1690 did not give any right to the superior which he had not before. The Act, 25th Geo. II., does not determine any thing: as it was a voluntary Act of the King to make a new donatar, it was natural to entertain a doubt whether such new donatar should pay a year's rent. The Act, 25th Geo. II., removed this doubt.

GARDENSTON. It is clear what was the law before 1690. But that excellent statute made a difference. It, in effect, provided, that the right of the Crown should be neither better nor worse than that of the forfeiting person.

BARJARG. The Act 1690 does not now exist to that extent: it was altered at the time of the Union.

AUCHINLECK. This is a case which seldom comes before us. The trustees are not purchasers; but *that* does not remove the difficulty. Every singular successor is bound to pay a year's rent. There is no Act of Parliament for this; but it is perfectly understood in practice. The question is, Whether are the trustees to be considered as *singular successors*? It is clear that, anciently, the King's donatar was not bound to pay any composition. I ascribe that to the nature of our sanguinary laws against treason. By Act 1690, forfeiture is

considered to be out of the question. How can the superior be deprived of a year's rent upon the change of a vassal?

JUSTICE-CLERK. The Act 1690 has nothing to do with the question. I only say, that the superior shall not, by that law, get a benefit which he had not by the common law of Scotland; and, in so saying, I do not impinge upon the Act 1690, which I have been ever taught to honour and admire.

PRESIDENT. I never heard that, since the time of Lord Stair to the Union, the King's donatar was obliged to pay a year's rent. Lord Bankton says the contrary. It is now agreed that the King is not a purchaser. The Act, 1690, gives no right to the superior which he had not before. The Act, 25th Geo. II., provided singly for the event of the trustees being altered, and removed a doubt concerning that case.

COALSTON. The Act 25th Geo. II. was a hard law, imposing upon subject-superiors, contrary to the genius of the Act 1690. That perhaps makes me the more ready to listen to any argument for the superior. Forfeiture, bastardy, *ultimus hæres*, are all upon the same footing.

KAIMES. I do not admit that purchasers must be entered upon payment of a year's rent. I mean *directly*, for, by the circuit of adjudication, a purchaser may force an entry. It was not till 20th Geo. II. that an easier method was devised; and the truth is, that that statute is very darkly expressed. The King and his donatar are the same: why should the King be bound to pay a year's rent, when the subject superior is bound to receive him?

PRESIDENT. I do not consider the Act 25th Geo. II., nor any of the laws passed on occasion of the late rebellion, as *hard laws*; but as wise and beneficent laws, appropriating the rents of the forfeited estates to the single purpose of improving that country where the rebellion broke out. As to the Act 25th Geo. II., in particular, it was a great measure of public policy: it provided for the indemnification of subject-superiors who inclined to sell their superiority, such as the Dukes of Athole and Argyle: those superiors, who, like the Duke of Gordon, did not choose to sell, it left to the determination and judgment of the common law.

On the 20th December 1771, "The Lords found the Duke of Gordon not entitled to a composition."

Act. H. Dundas, J. Montgomery. *Alt.* R. M'Queen.

Reporter, Kaimes.

Diss. Gardenston, Auchinleck, Stonefield, Monboddo.

[A petition was presented against this interlocutor, on advising which, with answers, (7th March 1772,) the following opinions were delivered:—]

HAILES. The Duke of Gordon lays much of his argument upon the clause in Act 25th Geo. II., which provides, that new trustees shall be received by the immediate superiors, without payment of a year's rent. Hence it is argued, *a contrario*, that the first trustees must pay a year's rent. But that clause seems to have been inserted from an over-caution in the Legislature to obviate, not to acknowledge a claim. Something of the same nature occurs in statute 21st Geo. II., c. 34, That, in all prosecutions for the crime of theft of cattle, or the masterful taking away or detaining the same, it shall be a good objection to any witness produced for proving the libel, that he was himself

particeps or *socius criminis*. So, again, in the statute 21st Geo. II., c. 34, That, in all prosecutions for frequenting any Episcopal meeting-house not allowed by law, it shall be lawful to produce, as witnesses, persons present, who may have been *socii criminis*. Hence, as in this case, it has been argued, that the objection of *socius criminis* went to the admissibility of a witness. Yet, in the Court of Justiciary, this objection, deduced from 21st Geo. II., has been as often disregarded as urged. In this very statute, 25th Geo. II., there is a proviso of the same kind, freeing the heirs of the trustees from passive titles, which they would not have incurred at common law.

MONBODDO. In the feudal law there was originally a *delectus personæ*; afterwards the superior was obliged to receive a vassal, but was entitled to a year's rent. The statute of Geo. II. seems express. It relates to all who shall either purchase or acquire. They are to be entered on payment of casualties. The only casualty is the payment of a year's rent. Before the Revolution, the donatar of the Crown did not fall within the rule. This I ascribe to the rigour of the law of Scotland in matters of treason. This was altered by the Act 1690. The Act was a correctory one, restraining the rigour of forfeiture. Upon the same plan the statutes after the Rebellion 1715 were framed. The practice in the case of *ultimus hæres* confirms this. There is also one instance since 1745, in the sale of the estate of Restalrig.

JUSTICE-CLERK. It is admitted, that, by ancient law in Scotland, a superior could not be compelled to change his vassal without a gratification given: that there is an exception where the fee opens by forfeiture to the king. His donatar must be received. The question is, Whether has this ancient prerogative been taken away? I do not see this case was in the eye of the legislature in 1690. As to the statutes after 1715, a method was provided for vesting the estate in the king, or his commissioners *vi statuti*. This was equivalent to a gift. The commissioners being once vested, when they came to sell, the purchaser behoved at common law to pay a year's rent.—But here the king cannot hold; he must vest the lands in a donatar. It is a condition in the superior's right that he shall be obliged to receive the king's donatar.—The common law of Scotland said, that, after a donatar is once established, the superior is not obliged to change his vassal. This was remedied by the statute obliging the superior to receive as many donatars as the king shall present.

PITFOUR. Of old, the tie between superior and vassal was indissoluble; but, when commerce came in, there was a necessity of mitigating the ancient constitution. The statute, *quia emptores*, was made in England: In Scotland the statutes of Alexander II. and James III. But vassals were not allowed an arbitrary admittance at pleasure: they behoved to pay for their admission. This was the purpose of the statute 1469. In the case of forfeiture the king takes the land, not by bargain, but from the necessity of the law in his own right. Shall the king pay for what he takes in his own right? This is not the case of a man giving away his lands for his own convenience: this is no branch of our ancient rigorous law in cases of forfeiture; for the same thing prevails in questions of bastardy and last heir. I do not look critically into the words of late statutes, but into the principles of the law of Scotland. The Act 1690 did not mean to abolish a part of our law inherent in the feudal constitution. The statute 25th Geo. II. provided for the case of donatars actually imposed.

COALSTON. The Act 25th Geo. II. has not sufficiently provided for the interests of superiors. By it subject superiors have forfeited the right of non-entry ; the duplicando and the composition to be paid by singular successors. I must give full effect to it, though I could not extend it beyond the words. I am now satisfied that the Crown takes from necessity.

PRESIDENT. No circumstance of equity, or idea of benignity, will make me alter the principles of the feudal law, which is the constitution of Scotland. I will not inquire into the reason of any principle of the feudal law ; but *here* Lord Pitfour has explained the principles. I do not consider the Acts 20th and 25th Geo. II. as hard laws. In great measures of government there must be little hardships to individuals.

On the 7th March 1772, the Lords adhered to their interlocutor, 21st December 1771.

Act. H. Dundas. *Alt.* A. Lockhart.

Reporter, Kaimes.

Diss. Monboddo, Gardenston.

1772. June 23. MESSRS GIBSON and BALFOUR *against* HUTTON and COMPANY.

NEGOTIORUM GESTOR.

Arrestment used by him *proprio nomine*, upon a blank admiral precept, not available to the person in whose name it was afterwards libelled, in a competition with an intermediate arrester.

[*Fac. Coll. VI. 44 ; Dictionary, 9283.*]

HAILES. The forms in the court of Admiralty as to blank precepts, &c. are certainly erroneous, but custom has sanctified them. We can go no further than custom has gone. If we argue from the analogy of erroneous forms, *where* can we *stop*? The next thing would be to sustain a precept without any name of pursuer, for the behoof of all concerned ; and it will be said that when the summons comes to be filled up, it will be time enough to insert parties ; and it will be pleaded that this also is very convenient, and not more erroneous than other forms already practised. Much is said of the security of foreign merchants, but every thing in forms must not bend to that security. The counter-objection seems over critical. It is said that the word copy of an arrestment should have been used. Yet this, in strictness of speech, is incongruous. By the same rule, an account of the Battle of Minden, in the Gazette, ought to be termed the copy of a battle.

GARDENSTON. Strangers would have been in a bad situation as the law stood, till lately, if the Ordinary's judgment were to be held as the rule. The

contrary maxim seems just, *ratihabitio mandato equiparatur*. The consequences apprehended from this doctrine will not follow. Gibson and Balfour could not have communicated the benefit to any one else.

KAIMES. My difficulty arises from the want of a mandate. Gibson and Balfour arrested in their own name, not in the name of their constituents. Equity cannot come in here, for there is a competition of creditors.

MONBODDO. I should have been clearly of Lord Gardenston's opinion, if arrestment had been laid on in the name of the foreign merchant. In that case *ratihabition* would have made it good. Gibson and Balfour, *tanquam negotiorum gestores*, might have arrested in the name of the foreign merchants, but there was a blunder in using their own names.

PITFOUR. Foreign merchants are not to be deprived of the benefit of diligence in this country. The factor may do diligence in his constituent's name without any mandate. An infant *indefensus* will be protected by diligence, such as inhibition, executed by any near friend. Why may not a factor or correspondent do the like with like effect? That Gibson and Balfour did diligence in their own name, was owing to their delicacy, as they had no express powers. But this ought to make no difference.

[This, with great submission, seems strange reasoning. An infant *indefensus*, who cannot appear for himself, is compared to a stranger who can; and the blunder of raising diligence in one's name who has no interest, is termed a piece of delicacy, and justified as such.]

KENNET. I think the *ratihabition* would have been sufficient without a mandate; but my difficulty was, that the precept run in the name of Gibson and Balfour, and that the summons could not be filled up in favour of another person;—if it could, the consequences would be terrible.

ALVA. The maxim of *ratihabition* does well in a question between the original debtor and a creditor, but not in the case of co-creditors competing.

On the 23d June 1772, "the Lords sustained the reasons of reduction of the Admiral's decret, in so far as concerns the debt due by Robert Cheyne to Michael Barston, &c. *viz.* :—That the defenders, Gibson and Balfour, took out the admiral precept in November 1766, and, in virtue thereof, in January 1767, summoned the said Robert Cheyne, and used an arrestment of Cheyne's ship, all in their own names, and without mentioning that they were factors or trustees for the said Messrs Barstow, &c., and that it is admitted, when they took out said precept, executed the same, and arrested in virtue thereof, they had no authority from Messrs Barstow for so doing, and that the summons in which Gibson and Balfour mentioned that they were trustees for these gentlemen, was not called in the admiral-court till January 1768, which was posterior to the arrestments used by Hutton and Company; and therefore reduced the decret in so far as it gives a preference for the debt due by Cheyne to Messrs Barstow, &c. to the debts due by Cheyne to Hutton and Company, for security of which they had arrested his ship, and repelled the counter-objections;" adhering to Lord Kennet's interlocutor.

Act. R. Blair. *Alt.* Ilay Campbell.

Diss. As to general point,—Pitfour, Gardenston.

1772. June 30. TRUSTEES of CHARLES MURRAY *against* EARL of MARCH.

ADJUDICATION.

Penalties not restricted.

[*Dictionary*, p. 268.]

On the 15th December 1729, Sir Alexander Murray of Stanhope granted an heritable bond of corroboration to Mr John Douglas, brother of the late Earl of March, for L.9862 : 10s. Scots ; and, in security of the payment of the said principal sum, annualrent from the term of Martinmas preceding, and a fifth part more of liquidate penalty, Sir Alexander disposed to him the lands of Stanhope.

On the death of John Douglas, the present Earl of March, his nephew made up titles to this heritable bond ; and, on 28th November 1749, after many years' interest was due, obtained decree of constitution against the heir of Sir Alexander Murray, on which he adjudged the estate of Stanhope, for payment of the said debt, extending to the accumulated sum of L.21,700 Scots.

A ranking and sale having been brought, the Earl was ranked, without objection, for the principal sum in his adjudication, and interest thereon. But the trustees of Mr Murray (who, by this time, was dead,) objected to the claim for the penalty. The lands being sold, it turned out that the price was more than sufficient to pay all the creditors, and that there would be a considerable reversion to Mr Murray's heirs. It, however, appeared, from a calculation which was lodged, that, even by receiving payment of the penalty, the adjudger would not be indemnified for the loss which he had sustained by not receiving his interest regularly.

The point was reported to the Court on informations, when the trustees, besides stating certain objections, in point of form, to the bill on which the summons of adjudication had proceeded, and to the summons of constitution, referred to the case of *Hamilton against Wiseman*, in 1753. The Earl, on the other hand, relied on the case of *The Creditors of Auchinbreck*, 12th July 1769 ; and *Creditors of Kinminity's*, 5th August 1757.

The following opinions were delivered :—

HAILES. It is said, that, in the days of Alexander II, the law was to comprise for principal, annualrent, and expenses. There was no such thing as annualrents known at that time. *Interesse* means *lucrum cessans*, not *annualrent*.

Lord March has not adjudged for more than the *interesse* : in truth he will draw less. I imagined that the case of *Wiseman* proceeded upon specialties ; and that the case of the creditors of *Auchinbreck* went upon the general point.

MONBODDO. This form of adjudication is authorised by the Act of Sederunt. An adjudication is a right of property, redeemable upon payment of the sums

adjudged for. I thought the case of Wiseman ill determined: the case of Auchinbreck well.

AUCHINLECK. We must determine by general rules. If people have not their interest paid punctually, they must borrow money to support themselves. It is no matter whether that was actually the case here or not.

COALSTON. If the creditor had been nimious in diligence I would have followed the judgment in the case of Wiseman; but no such thing here. On the contrary, the charge against him, is, that he was too indulgent. The penalties are not sufficient to indemnify him for the want of his money.

PITFOUR. Though general rules should be observed, yet the Court ought not to give up its Prætorian powers. The objections to the adjudication are slender; but, as slender objections have been sustained against an expiry of the legal, why not against an adjudication? I would strike off some part of the penalties.

PRESIDENT. Penalty in a simple bond is different from a penalty in an adjudication. The case of Auchinbreck is strong. Lord March was no rigorous creditor. There is a difference between a question among onerous creditors and a question with the heir. Objections might be sustained in the former case which would not in the latter.

On the 30th June 1772, "The Lords repelled the objections, and found Lord March entitled to his full penalties."

*Act. H. Dundas. Alt. J. Montgomery.
Reporter, Pitfour.*

1772. July 1. ELIZABETH SUTHERLAND *against* ROBERT SYME.

HUSBAND AND WIFE.

- I. A husband and wife having, by a contract, agreed to live separately, and that the husband should pay her an annuity, which she accepted in full of her legal claims; and the annuity having been paid until the death of the wife,—*found* that a revocation privately executed by her, previous to her death, was not effectual.
- II. An heritable subject belonging to the wife, having been sold by her, with her husband's consent, and the price uplifted by him,—*found* that he was bound to account for it to her representatives.

In 1733, the defender was married to Jean Reid. In 1762, a contract was executed between them, which proceeded on the narrative, "Whereas the said Robert Syme and Jean Reid, finding that it is both disagreeable and inexpedient for them to live together, have agreed to live separately: and, as there is no contract of marriage betwixt them,—for supplying that defect, and for the said Jean Reid her better accommodation and subsistence," &c. By this contract, the defender, besides allowing his wife to take with her a quantity of household furniture, agreed to pay her an annuity of L.30 during her life. On the other part, "and in consideration of the premises, the said Jean Reid has

accepted, and hereby accepts of the foresaid yearly annuity of L.30 in full of all that she can ask or claim from the said Robert Syme, in name of terce of lands, half of moveables, or others whatsoever, that she might claim or pretend to, in and through his decease before her, and in full of all that her nearest in kin can ask or claim, in and through the decease of the said Jean Reid, before the said Robert Syme ; all which is hereby discharged."

This deed was implemented by both parties, till the death of the wife, which happened in 1769 ; she, on the one hand, having lived separately, and, on the other hand, the defender having regularly paid her annuity. On the death of the wife, however, it appeared, that, in 1765, she had executed a general disposition of her whole property in favour of the pursuer, her niece ; and which disposition contained, *inter alia*, a revocation of the foresaid agreement and postnuptial contract of marriage, on the narrative—that she had been compelled to enter into it : that it had never been ratified by her : and that, being executed *stante matrimonio*, to her undue lesion, it was revocable by her at any time.

Upon this title, the pursuer raised an action against the defender, concluding, *1mo*, For reduction of the foresaid contract, and to have it found that the pursuer was entitled to such share of the defender's effects as his wife's executors would have drawn if no such agreement had existed : *2do*, That the defender should account to the pursuer for the price of some heritable subjects which had belonged to his deceased wife ; and which, during the marriage, had been sold by her with her husband's consent, and the price uplifted by him, but which he had never accounted for. The case was reported to the Court upon informations.

PLEADED BY THE PURSUER :—

As to the *first* point,—The contract of separation was a revocable deed, and was, accordingly, revoked by Jean Reid.—Ersk. i. 6. 18 ; *Cramond* against *Alan*, 4th January 1757. As to the *second* claim ; the subject of which the price is sought was an heritable property belonging to Jean Reid, the price of which, on its being sold, became hers, and did not fall under the *jus mariti*. It is proved that the defender received the price ; which throws upon him the burden of proving that he either accounted for it to his wife, or that her claim for it was discharged.

PLEADED BY THE DEFENDER :—

On the *first* point : *1mo*, The deed was not in its nature revocable. It was a postnuptial contract of marriage, as well as a contract of separation, and was a fair and onerous deed, as the annuity stipulated in favour of the wife was a full equivalent for her legal claims, which she renounced. Such reciprocal settlements are not revocable.—*Voet*, lib. 24. tit. 1. § 10. *Bank*, lib. 1. tit. 5. § 95. *Ersk*, lib. 1. tit. 6. § 18. *M'Gill*, 22d November 1664. *Chalmers*, 25th July 1710. *Stirling*, 31st July 1716. *Gib*, 14th March 1634. *Stewart*, 21st February 1606. *2do*, Supposing this contract had been in its own nature revocable, the deed of revocation, executed by Jean Reid in 1765, cannot be effectual, because it never was intimated to the defender that she was dissatisfied with the previous contract ; and, from that time till her death, she homologated it by receiving payment of the annuity of L.30. In such circumstances, it would be contrary to good faith to give any effect to the deed of revocation.

As to the *second* point ; the price of the heritable subject in question fell under the *jus mariti*, and any claim for it is moreover barred by the foresaid post-nuptial contract.

The following opinions were delivered :—

AUCHINLECK. This woman revokes, and then draws her aliment. I should be heartily sorry if there were law for this ; but I think there is none.

HAILES. If marriage be *individua vitæ consuetudo*, it is hard to perceive how a contract of separation can be a contract of marriage : there should have been first a marriage-contract and then a contract of separation. The ambiguity arises from making one deed serve for two : Be this as it will, although Jean Reid might have revoked, she did not. Every half-year's aliment which she received was virtually a departing from this supposed and latent revocation. It is said that her receiving the aliment was nothing ; for that, at any rate, she would have been entitled to an aliment. That I deny, unless *causa cognita* : besides, how do we know that a court of justice would have settled her aliment at £30 per annum ? or that Mr Sime would not rather have taken her back and lived with her, than have paid such aliment ? The pretence that the receiving £30 was necessary for her subsistence, is nothing ; because, if she had revoked and insisted for an aliment, the Court would have given her an *interim* aliment. As to the price of the heritable subject, the presumption is, that Mr Sime received it ; but, as it was not demanded from him while they lived together, or when they separated, it must be considered as spent by the mutual agreement of husband and wife.

KAIMES. At the instant of separation the wife is little in the husband's power : there is no appearance here of *donatio inter virum et uxorem*, which is revocable. Thinks that the price of the heritable subject must go to the wife's heirs.

MONBODDO. The first claim is destitute of foundation. Contracts betwixt man and wife are valid deeds : the contract here is not *dicis causa*, but fair and rational. The wife cannot be allowed to revoke : The contract was not only made, but implemented. As to the second claim for the value of the heritable subject, it is well founded : the price was paid to the man and wife. The presumption is, that he intromitted with it.

KENNET. This is both a marriage-contract and a contract of separation. It could not be revoked : it has not been revoked. As to the price of the heritable subject, the money was received in 1737 : the wife never insisted to have it re-employed. This is, in effect, a consent that the husband should use it as his own : no mention was made of it at the time of the contract of separation.

PITFOUR. As to the second point, the acquiescence of parties shows what was intended.

ALVA. Here an onerous deed and no revocation : But there is no evidence that the price of the heritable subject was to go to the husband.

COALSTON. All are agreed as to the first point. As to the second, there is a legal presumption that the price was received by the husband. No evidence that it was applied to the wife's use, or was discharged by her. It is not sufficient that the wife neglected to bring an action against the husband.

AUCHINLECK. Mr Sime can only be liable in terms of his own declaration ; for there is no other evidence of his having received the money.

PRESIDENT. There seems here to be a marriage-contract, rational in order to bar the claim of communion. As to the second point ; a small subject belonging to the wife is sold,—the price is received by the husband,—the wife does not desire to have it re-employed. Covenants ensue after this, and no mention is made of that price. In such circumstances, I shall presume every thing to liberate the husband.

GARDENSTON. The wife is barred by the discharge ; but there is more difficulty as to the second point. I think that the executor is entitled to recover the price of the heritable subject : The price belonged to the wife ; the moment that the sale was made, she became creditor in it. If so, how can she be divested of it by the act of the husband, without her consent ? If there was any acquiescence, she revoked it by her act of separating from her husband. The contract of separation has no respect to this subject.

On the 1st July 1772, the Lords found the postnuptial contract valid and not revoked ; but found the wife's executrix not barred from the legal claim for the price of the heritable subject.

Act. R. Blair. *Alt.* Cosmo Gordon.

Reporter, Gardenston.

Diss. as to second point, Auchinleck, Pitfour, Kennet, Hailes, President.

1772. July 7. JAMES WILSON *against* ROBERT ARMOUR and JANET SMITH.

PASSIVE TITLE.

Intromission to a trifling extent, and without fraud, found not to infer a Passive Title.

[*Faculty Collection*, VI. 21 ; *Dictionary*, 9,888.]

KENNET. It is impossible that the defender could be liable *gestione pro hærede*, because he was not heir, and because he intromitted with the writings at the desire of the pursuer. The passive title of intromission is not proved, because the intromission was very trifling.

MONBODDO. A general intromission, or with the *animus* of being heir, is sufficient to constitute the passive title. Such was the Roman law, and such our law in Durie's time. That law has been revived by a late decision in the case of *Milmine*.

KAIMES. In disorderly times men were apt to lay to hands ; there was a necessity of strictness. Now, in more civilized times, there is no occasion for such strictness, unless when there is evidence of fraud or of intentional concealment.

GARDENSTON. We ought not to think ourselves wiser than our predecessors : we ought not to change the law. I would wish to know what is vicious intromission if this is not ?

COALSTON. According to the opinion of Lord Stair, vicious intromission only takes place where the intromission is universal. It is clear, from the authorities of lawyers, that, to constitute this passive title, something like a general intromission, or appearance of fraud, must be shown.

PRESIDENT. I know not what I would have done had I been a judge a hundred years ago ; but I have no doubt now.

On the 19th June, and 7th July, 1772, the Lords assoilyied ; adhering to Lord Auchinleck's interlocutor.

Act. J. Boswell. *Alt.* W. Wallace.

[*N.B.*—From page 17 of Mr Boswell's second petition Dr Samuel Johnson dictates.]

1772. July 21. THOMAS CHRICHTON and ANDREW DOW *against* PETER SYME.

WRIT.

- I. Act 1681, c. 5, requiring witnesses, applies to all deeds, whether of importance or not; the Act, relative to such distinction, being 1579, c. 80.
- II. A cautionary obligation in the form of a Missive, not holograph of the granter, not mentioning the writer's name and designation, and without instrumentary witnesses, not sustained as a formal deed, or actionable, nor the defect suppliable by the granter acknowledging the verity of his subscription.
- III. Found competent in the same action, though grounded singly upon the same deed, and also relevant to refer, to the granter's oath, that he came under a verbal obligation to the like effect.

[*Faculty Collection*, VI. 50 ; *Dictionary*, 17,047.]

AUCHINLECK. I do not think that the obligation is valid in law.

MONBODDO. Any obligation may be constituted, when the party acknowledges his subscription and his knowledge of the contents. There is a distinction between a deed and an obligation in writing : A deed requires solemnities ; to that the statutes apply : if solemnities are not adhibited, the deed is null, and it is not enough to prove the subscription. But no statute requires solemnities in an obligation when sufficiently authenticated.

HAILES. I was the single counsel in the case of *M'Kenzie*. One naturally conceives prejudices in such a situation. I confess that it was long before I could digest that decision ; but I hope I have now overcome those prejudices.

The decision of *M'Kenzie* and *Park* has been frequently repeated. I think it agreeable to the words and spirit of the statutes, and useful in its consequences.

PITFOUR. I do not know that decisions have differed as to this point. I am sure that statutes do not. We cannot repeal statutes. There are but two exceptions, holograph writings and deeds *in re mercatoria*; those exceptions are established in practice. I know no difference between a formal and informal writing, but that the one is valid and the other void. If you miss but a letter in a bond, (servitor for servitors,) the bond is void. Shall we say, that there may be every omission in a missive letter, obliging one to grant a bond?

COALSTON. The deed, as it stands, is not probative: The question is, How far may it be made good by the acknowledgment of the party? Defects in deeds may be supplied by homologation, why not by consent? How can homologation, which is an implied consent, be stronger than direct consent? Since the decision in the case of *M'Kenzie*, many decisions have been pronounced to the same effect; always to my great distress. But, as the Court is now constituted, the prevailing opinion is contrary to mine. I am willing to submit to the majority.

ALEMORE. The obligation is not a written obligation good in law. When one homologates, he acts with his eyes open.

KAIMES. An obligation which is null cannot be supplied by specifying the writer and witnesses. But where is the statute which says, that a man's acknowledgment will not be good, (it is admitted that his oath would be good,) even in a cautionary obligation? If he says, "that is my subscription," what more is there necessary?

PITFOUR. If a man says, "I did promise to become cautioner," it would be nothing, for that still there would be *locus pœnitentiæ*.

PRESIDENT. The statutes are express. We are not to set up loose presumptions against them. Homologation is quite a different thing from acknowledging subscription: it is an implied renewal of the obligation. I was for the decision in the case of *M'Kenzie*, and am pleased to see one judge give up his prejudices against that decision, and another "yield his opinion to that of the majority of the Court."

On the 21st July 1772, "The Lords sustained the defence."

Act. Cha. Hay. Alt. Alex. Law.

Reporter, Justice-Clerk.

Diss. Kaimes, Monboddo.

1772. *January 28 and July 22.* COUNTESS DOWAGER of MORAY *against* JOHN BANE STEWART and OTHERS.

TACK—FIAR ABSOLUTE AND LIMITED.

- I. Tacks may be let by a fiar, notwithstanding of a prior liferent, by way of locality granted by him in a contract of marriage.
- II. A tack, not signed by one of the parties, but followed by possession, and other circumstances, whence *res non est integra* was argued, found not effectual; but this reversed on appeal.

PITFOUR. As Lady Moray has not homologated, I see no difficulty. Although her right had been posterior to the tack, still the tack would have been ineffectual as to her, because it is not a proper tack in the sense of law,—that is, a tack clothed with possession. Homologation may bar objections against a tack, but will not render it good against singular successors. Here Lady Moray's right is prior to the tack; it is as good as any other real right. Can a man grant a tack who has denuded himself *pro tanto* or for a life? It is said that there was nothing unfair intended on the part of the late Earl. I do not suppose that there was: but what does that say to the rights of a singular successor, either prior or posterior? If the Countess had been an heir of provision, she would have been obliged to perform Lord Moray's obligation, or to have proved fraud. The right of administration pleaded on, is not a necessary right of administration where entails subsist; yet such right of administration is specially excluded, and a right of administration which may be excluded is not a necessary one. The Earl of Moray could not exercise a right which is conveyed to another. In marriage-contracts there is sometimes reserved to the husband a power of granting leases beyond his own life; sometimes there is a power to the lady of granting leases for 19 years, or for a certain period, instead of the uncertain period of her own life. Thus the rights of husband and of wife may be extended by special convention. The opinion of Sir George M'Kenzie is express; so also is the opinion of Sir James Stewart, (*Answers to Dirleton's Doubts v. Liferenter*;) the opinion of lawyers a hundred years ago; and no judgment to the contrary shows what is the national opinion.

GARDENSTON. Where there is a co-existing right of fee and liferent, the concurrence of both is necessary to the granting of a lease. *Here* the case is different, for Lady Moray has no more than an uncertain eventual right.

COALSTON. It is not necessary to inquire whether Lord Moray is bound by the lease. My doubt is, how far can Lady Moray be bound? Tacks were personal contracts before the Act 1449. That Act made tacks clothed with possession to be good against singular successors; *but an obligation to grant a tack* is not good against singular successors. *Here* is no tack at all,—not so

much as an informal deed : it is no more than a tack to be inferred from acts of homologation. In what a state would purchasers be in, were they obliged to inquire into all facts and circumstances which might infer an obligation on their authors ? And where would our boasted security of records be ? I am of Lord Pitfour's opinion as to the other question also, but that is unnecessary to be determined.

JUSTICE-CLERK. A right is not to be less secured by the force of the records because it is contingent. Much has been said to subject Lord Moray personally ; but the question *here* is, as to the situation of matters at the commencement of Lady Moray's liferent.

MONBODDO. A personal obligation to grant a lease will not be good against singular successors ; but, if possession follows, the case is different : but I think that, in this case, there is no title of possession which could be good against singular successors. Although the tack had been signed by Lord Moray, it would not have been good ; for there appears to have been a blank in it, as to the quantity of dykes to be built by the tenants. The blank was not filled up by the writer, for the writer appears to have been an instrumentary witness : it must have been filled up after his signing. As this obligation to build dykes is, in effect, part of the rent, and unless it be formal, the tack is imperfect in its essentials. As to the other point, Sir George M'Kenzie's Observations on Act 26th James IV., is much to the purpose. The general clause, *otherwise*, in that Act will extend to the case in hand.

AUCHINLECK. Lord Moray is no party. Here the only question is, Whether can an intended tack, not homologated by Lady Moray, be good against her infestment ?

On the 28th January 1772, " The Lords found the letters orderly proceeded, and decerned in the removing.

Act. H. Dundas, R. M'Queen. *Alt.* G. B. Hepburn, A. Crosbie.

Non liquet, Gardenston. Hearing on concluded cause.

[A petition was presented against this interlocutor, on advising which, with answers, the following opinions were delivered :—]

AUCHINLECK. It would be dangerous were the husband not to have the power of granting leases at a reasonable rate of lands provided in liferent to the wife. The tack here is binding on the tenant, and therefore binding on the Countess.

HAILES. It cannot be denied that several of our writers have held that the husband has no power of granting leases, which may be effectual against the wife, of the lands provided to her in her liferent locality. I imagine that they have so held from not distinguishing between conjunct fees, properly so called, and liferents of locality.—The old custom was to secure a provision to a wife by a *conjunct fee*. When marriages were early, the young people were provided in a portion of the family estate, taken to them in conjunct-fee, as well in effect as in name. *There* both husband and wife were fiars, having a co-existing right of property. The husband could not grant a lease of such subjects to be

effectual after his death, when the wife came to have the sole exercise of this right which had been provided to her. To illustrate my meaning, by an example : there is registered in the Books of Session, *7th December 1540*, a marriage-contract between Norman, fiar of Rothies, with consent of George Earl of Rothies, his father, on the one part, and John Low Lindsay and Isobella Lindsay, his daughter, on the other part. The tocher is 2400 merks ; the *conjunct-fee* lands are valued at 200 merks of pennymail. In this case I suppose that Norman Leslie could not have granted a lease of the conjunct-fee lands to be effectual after his death, and during the life of Jean Lindsay, without the consent of Jean Lindsay. In Chambers of Ormond's account of Scotland, *temp. James VI.* the provision of lands to widows is termed their *conjunct-fee*. To this case, not to modern localities, are the decisions in Balfour to be applied : and indeed they are as express as can be. By degrees another mode was introduced : women were provided in liferent-rights of land by way of locality. Our lawyers seem to have overlooked this change in the form, and to have considered those localities as of the same nature with the ancient *conjunct-fees*. This is the only way that I can account for the opinions of Sir George Mackenzie, Sir James Stewart, &c. Certain it is, that, in practice, the husband is understood to have that right which the authorities of those lawyers deny to him. We have all seen in practice what violent controversies have arisen between heirs and widows having locality lands ; and yet there is no example of a widow endeavouring to set aside leases of her locality lands granted by her husband.—I think that Lord Moray could have granted a lease to the suspenders.—I think he did what was sufficient to found an action against his heir for compelling him to grant a lease ; but I do not see any lease here. There is nothing on which Lord Moray could charge the tenants or take decret against them : there are only circumstances which may afford a ground of action for executing a lease. This ground of action seems not effectual against the Countess of Moray, infest in a liferent locality.

MONBODDO. I have no notion of the distinction between *conjunct-fees* and a *liferent locality*, which Lord Hailes has endeavoured to establish. Every tack good against the granter, and clothed with possession, will be good against singular successors, no matter by what evidence it is proved. This tack is not good against the Earl of Moray : never having been signed by him, it could only be good by homologation, or by a *rei interventus*. There is no homologation here : all that was done was that the Earl of Moray, or rather his factor, received the rent. There is no *rei interventus* which can apply to a lease of nineteen years. As to the point of law, I think the tack not good. I know no difference between a *conjunct-fee in a wife* and a *simple constitution of a liferent*. Here is the authority of lawyers, and even of a statute, referred to by Sir George Mackenzie. The principles of law are equally clear. By the Roman law, any right, depending upon a conditional event, was, whenever the condition existed, understood to take place from the time the right was granted. This is the case here. I am not moved by the practice of men of business, nor by the general opinion. I do not think that the tenants were bound to Lady Moray.

COALSTON. It is not necessary to determine whether the tack is binding on

the Earl of Moray. Supposing both a verbal set, and a *rei interventus*, barring a power of resiling, my doubt is, Whether this would be good against a singular successor? *Rei interventus* is no more than a personal bar. The Act 1449 relates only to written tacks, or to tacks having *terms to run*. Were we to find the writing in controversy binding against singular successors, it would unhinge the security of singular successors. They would be obliged to inquire into every verbal communing of the seller. A tack, clothed with possession, may be good against the granter, and yet not against singular successors. It is of the utmost importance that tacks, artificially patched up by proofs and circumstances, be not considered as valid against singular successors. It is not necessary to determine the other point. The marriage-contract goes upon the supposition that the estate was to be under tenantry. *No vacua possessio* is warranted: Tacks are a natural burden on lands: purchasers of every kind must take the lands with the burdens.—If lands were disposed with infeftment of warrandice, this would not bar the power of granting tacks. In practice, the consent of the liferenter has never been required to tacks granted by the husband.

GARDENSTON. If the tack is good against the granter and his heirs, why not against singular successors? It is just as good a tack as any in the law of Scotland. There is no danger here as to singular successors, for the singular successor, upon inquiry at Lord Moray, would have got satisfaction as to the state of the case. [This is certainly an erroneous argument. In treating of a general point, we must lay characters out of the question. By the same argument, there is no security from records more than if there were none, and every personal debt good against purchasers. For it may be said, the purchaser has nothing to do but to ask the seller what burdens there are upon his estate, and he will learn all that is necessary for his security.] There is a distinction as to singular successors: there are different species of them. The singular successor *here* is not one who gets a right immediately, but who has only an eventual right, which perhaps might never take place. In common cases of singular successors, the granter is denuded: *here* not. The power of administration was, moreover, from the nature of the thing, reserved. Clear of Lord Auchinleck's opinion as to the other point.

KENNET. Consideration being had both to principles and practice, I think that Lady Moray could not challenge the tack granted by her husband, although after her infeftment. The contrary doctrine would be productive of the worst of consequences.—Rents could not, upon that supposition, be procured. Tenants could not be bound. The tack is binding on Lord Moray and his heirs. As to the point of Lady Moray being a singular successor, my difficulty is not removed. The Act 1449 mentions *terms to run*: here the tack is binding on Lord Moray as having *terms to run*, and therefore binding on singular successors.

KAIMES. I have no doubt that the granting of a liferent locality does not interrupt the husband's administration. The question, however, is, Whether a proprietor is not bound to regard the interest of the liferenter? The warrandice does not mean that 9,000 merks is the *ultimatum*, but only that the lands shall be worth that sum at least: if the rest had been as good as it could have been,

there would have been less difficulty. Here there is, by carelessness, a lease at an under value. As to the lease being binding on the Earl of Moray, it was his will that the lease should be in writing : he has not signed ; therefore there is a declaration that this lease is not his will. I do not see any legal evidence of homologation. Of Lord Coalston's opinion as to the sense of the statute 1449 ; and I cannot express my sentiments so well as he has done.

PITFOUR. I do not think Lord Moray bound ; for this tack required writing to its probation and constitution. It is said that the tenants were bound, therefore Lord Moray is bound. I do not see that. In a mutual contract, one side cannot be bound. The tack might have been homologated by a *rei interventus* ; but I see nothing of that. Suppose Lord Moray to be bound, still the defence of singular successor seems invincible. The favour of tacks must not be carried so far as to render the commerce of lands impracticable. The Act 1449 never meant to bring in a bag of pleas under the cover of tacks. An intention of a tack can never be equal to its *execution*. I do not think the tack good against the liferenter : the principle is—*prior tempore potior jure*, and *nemo potest plus juris dare quam ipse habet*. I think the Earl of Moray was denuded of the temporary liferent, in the event that happened, just as in the case of a wadsetter. The Earl's right is *tanto minus* of the liferent right : the tenants ought to have secured themselves by taking the consent of the liferenter. Sir George M'Kenzie plainly lays down the principles for which I argue. I see no bad consequences from them.

ALEMORE. The consequences would be very bad. Many cases of this kind will occur in tailyied estates. The principle would lay waste the greatest part of Scotland : tacks will be desultory, and confusion will arise. Localities were granted in order to support tailyies, by preventing the increase of burdens on the estate, and in order to make the widow independent of the heir. This locality is not of the nature of a disposition to an onerous purchaser : the liferenter must submit to the fiar, not the fiar to the liferenter. The husband has still the administration,—the right of locality notwithstanding ; but he cannot do any thing fraudulent, to hurt the right of the liferenter. If the lease is binding on Lord Moray, it is binding on Lady Moray ; for a liferenter cannot challenge a lawful act of administration of the husband.

ALVA. A husband, notwithstanding the right of locality, retains a right of administration. But I doubt whether Lord Moray was bound by this transaction, or whether any thing more was incumbent on him than to indemnify the tenants.

PRESIDENT. Where lands are settled in locality to a wife, it is in the power of a husband to grant leases for a competent rent. The opinion of lawyers may be otherwise, but practice has mitigated that strictness. There is no example of a tack set by a fiar and reduced by a liferenter. Many marriage-contracts have been directed by great lawyers, without any idea of this supposed right in the liferenter. The consequences of a different rule as to times past would be dreadful. Many marriage-contracts are in the style of Lady Moray's,—many tenants are in the situation of the suspenders. All those tenants must be removed, and actions of warrandice against the setters must be commenced,—tacks must sleep during the liferent, and tenants must starve in the *interim*. As

to consequences in time to come, no man will be able to set his lands without his wife's consent. A liferenter takes with the burden of tacks: there is no such thing as that drawing back of her rights, mentioned by some of the judges. I do not think that, in 1449, it was in the power of the liferentrix to remove tenants. I think that Lord Moray was bound, and, consequently, Lady Moray. This will not hurt singular successors; for the record of tacks is *possession*. The purchaser can always see *who* is in *possession*; if he does not, the blame is his own.

On the 22d July 1772, the Lords found that the late Earl of Moray, notwithstanding the prior liferent, by way of locality granted to the Countess, and her infestment thereon, had right to grant tacks of the lands, contained in said locality, effectual against the Countess: But found that the *tack* in question, (it should have been writing,) not having been regularly executed by said Earl, is not effectual against the Countess; and, therefore, in so far adhere to their former interlocutor, finding the letters orderly proceeded.

On 5th August 1772, refused a reclaiming petition as incompetent.

Act. H. Dundas, R. M'Queen, A. Lockhart. *Alt.* G. Buchan Hepburn, A. Crosbie, Ilay Campbell.

Diss. Alemore, Gardenston, Kennet, Auchinleck, Stonefield, President.

1772. February 21 and July 29. JAMES CATHCART of Carbieston against JAMES ROCHIED of Inverleith.

JURISDICTION.

Brief of division among heirs-portioners. Sheriff of the county, where the lands are situated, the only judge competent thereto. Advocation from him, when *in cursu* of obtemper- ing a brief at one party's instance, for dividing so much of the common estate as lay within his territory, to the Macers of the Court of Session, as Sheriffs specially constituted for dividing the *universitas* partly situated in another county, in virtue of brieves to that effect issued upon the application of the other party interested in the division—*Refused.*

[*Faculty Collection*, VI. 21; *Dictionary*, 7,663.]

GARDENSTON. The division ought to proceed before the macers, because the lands lie in different counties.

PITFOUR. Such brieves have seldom occurred, because generally estates were limited to heirs-male, and division thereby prevented. It will be difficult to say how the Sheriffs have the power of division, or that the Court of Session ever refused to advocate the brieves of division. If this matter is left with the Sheriff, it will be inextricable; for the whole estates must be divided. One portion in each estate cannot be given to one, and another to another: the different shares of the heirs-portioners must be laid together in one shire or another.

HAILES. The argument for Mr Cathcart contains many things new to me. The notion that, in former times, females were generally excluded, is undoubt-

edly erroneous. It is certain that the brieve of division among heirs-portioners was well known, and that it proceeded before the Sheriff. The estate of Gilmerton, in Mid-Lothian, was divided among the heirs-portioners of Spense of Condie, advocate to Queen Mary. There are, no doubt, many instances of the same kind; but, as they go not into any record, they lie concealed in the archives of private families. There is nothing which requires a total division of all the lands of the co-heirs, wherever situated. The notion of laying the portions together is new: at this rate, if the subject divisible be superiorities and property, the superiorities may be given to one and the property to another. There is no reason for this: the right of each co-heir is the same before division as after it, only the mode of possession is changed. Why leave the ancient track, by advocating from the Sheriff? Why may not the Sheriff of Mid-Lothian proceed in this division? And, when the parties incline, why may not the Sheriff of Berwick proceed in the division within his own shire?

AUCHINLECK. Of late years brieves of division have been rare. Before the Act 16th Geo. II., they were common, for the special purpose of dividing the *old extent*. The question between the parties is, *where* shall the division proceed? In the case of division every man gets his share of every estate. Suppose that part of the estate lay in Orkney or Shetland, part in Mid-Lothian; would you send one of the co-heirs to Orkney or Shetland, and keep the other in Mid-Lothian? How can we compel parties to this? Each must have his share.

JUSTICE-CLERK. This Court is a paramount court; but, in ascertaining the exercise of our powers, we ought to inquire how our predecessors have exercised them. There is no occasion now for us to go farther than they did. There is no evidence of any precedent advocating to the macers. The sheriff is the ancient and the proper judge. It makes no difference that the estates lie in different shires: the division may go on separately. There is no necessity to have recourse to the macers here. The macers might take the aid of a jury in Edinburgh, but how can they do that in Berwickshire. Either party may say, I have a share in each estate, and will not take compensation out of the other estate. Cases may occur where the law will take a latitude in dividing, so as to give different farms to different heirs-portioners; but this is none of them.

BARJARG. There is a contingency in the estates, and therefore it is proper to bring the whole before the macers.

KENNET. It is not necessary to determine the powers of the macers, for there occurs no reason for removing this question from the sheriff.

PRESIDENT. The first question is,—How far is it competent to advocate the brieve of division. I think the advocacy is not competent. This is a pleadable brieve, as is observed in Mr Rocheid's memorial. There is no example of an advocacy. It is the part of a jury to cognosce upon the brieve of division, judging from their own view of the ground. The brieve of perambulation resembles the brieve of division. In it the Act of Parliament requires a jury, if possible, out of the neighbourhood. How can an Edinburgh jury give their opinion of lands in Berwickshire which they never saw. As to the expediency of this advocacy, it would be expedient were Darnchester to be awarded to one, and Innerleith to another. *There* the interposition of this Court might be

necessary; but I see no law for such allotments. By the same rule, when lands lie in different counties, a widow might have the whole lands in one county allotted to her as her terce. If you divide an estate thus, and one of the portions is evicted, where will the redress lie?—against the party whose portion is not evicted?

ELLIOCK. The question here is, as to the competency, not the mode of division. There are good reasons for denying the advocacy. The sheriff is the only competent judge. It is said, that, if Inverleith were the only estate, the objection against advocacy would be good; but *here* there is another estate, in another county,—Darnchester. What then? May not the sheriff of each county expedite the division of each estate? There is no example of advocacy from the sheriff to the macers. It is impossible to follow that plan of giving one estate to the one, and another estate to the other; and yet upon this the advocacy is founded.

COALSTON. The distinction between brieves, retourable and not retourable, is not arbitrary: in retourable brieves the macers have a jurisdiction. *There* they have nothing to do but to report the opinion of the jury: In *pleadable* brieves the case is different; for *there* the macers must go to the lands with the jury and assessors: are the macers to give decreet in this case, in their own name, or in the name of the Court? They can do neither. If one half of the estate consisted of houses, the other of lands, would you give the houses to one of the co-heirs, and the lands to another?

On the 21st February 1772, "The Lords remitted *simpliciter* to the sheriff."

Act. J. Montgomery. Alt. R. Blair.

Reporter, Stonefield.

Diss. Kaimes, Pitfour.

PITFOUR. I was against the decision, from the analogy of the Roman law in the question *familix erciscundæ*. I now perceive that the analogy does not hold. With us, heritage cannot be divided *in cumulo*, because lands may hold of different superiors. With us, every action of this kind must be *communi dividundo*. Mr Cathcart's argument does not apply to pleadable brieves. Expediency has introduced the practice of brieves before the macers in matters not pleadable. There is no reason for delegating to macers the power of all inferior judges. If we delegate to them this part of the sheriff's jurisdiction, why may we not every other part?

MONBODDO. The brief of mortancestry and the brief of inquest were anciently different, as appears from Glanville and Balfour: that of mortancestry was pleadable, that of inquest not.

PRESIDENT. Quoted the decision in Fountainhall, 28th February 1694, Lord Arbutknot, to show that formerly even the brief of tutory was not advocated to the macers without cause shown; and said he was glad that Lord Pitfour had now come over to the opinion of the Court, for the very same reasons which he, the President, had formerly suggested.

On the 29th July 1772, "The Lords adhered to their interlocutor of the 22d February 1772."

Act. A. Lockhart. Alt. H. Dundas.

1772. August 1. SAMUEL COLE and OTHERS *against* EPHRAIM FLAMARE and SON.

BANKRUPT—*FORUM COMPETENS*.

Act, 12th Geo. III. cap. 72, extended to the case of a foreign debtor's effects in this country, and an application for sequestration thereof, in terms of the said Act, in name of the debtor, found competent, and sufficiently authorised by a general letter of mandate to his brother, whom he had originally intrusted as institor for disposal of these goods in Scotland, in a question with other English creditors who had attached those goods by arrestment.

[*Fac. Coll.*, VI. 65 ; *Dictionary*, 4820.]

ALEMORE. It is extremely expedient that assistance should be given, in Scotland, to creditors. It is hard if neither the laws of the one country or the other can give a remedy. If a person in England is willing to make an equal distribution of his effects in Scotland, there is nothing in the statute to prohibit it. He cannot be obliged to produce his books, because they are in other hands ; but we may go as far as we can.

MONBODDO. The argument, on the other side, resolves into this ; we cannot do every thing, therefore we should do nothing. After arrestment is laid on, a foreigner is, as to the goods arrested, in the same situation as a native : Poinding may then proceed ; why not sequestration ?

ALVA. The words in the beginning of the Act do not exclude this application. Although one part of the Act may not be executed, another may.

GARDENSTON. This is a liberal law, and should be liberally construed. The first clause of the statute is not applicable to foreigners, but the other is. It is true, that, with respect to foreigners, the law cannot be carried into execution in all its parts ; but what then ? The same thing will happen when a Scotsman becomes bankrupt in England.

PITFOUR. I see the bad consequences of a narrow construction of the statute, and the propriety of a liberal construction. Besides, the law is itself sufficient for the remedy sought.

COALSTON. The great intention of the statute was to wipe off the aspersion on our law as favouring Scottish creditors, and to introduce a *pari passu* preference. The question is as to that clause which allows the debtor to apply for a sequestration. The statute is broad enough for the remedy.

PRESIDENT. I am now clear of opinion for granting the remedy. Much absurdity would arise from the contrary opinion. We may order the books to be produced, and the bankrupt will have this excuse to offer,—that the books are not in his power.

On the 1st August 1772, “The Lords found that there was sufficient authority for the petition ; that the petition was competent ; and accordingly sequestered the goods.”

Adhered, 11th August 1772.

Act. R. Sinclair, H. Dundas. Alt. W. Bailie, J. Montgomery.

N.B.—I expressed my doubts of this judgment. I thought the measure a good one, but I did not see the authority for it in the statute. I could not approve of a liberal interpretation in a case which certainly had escaped the observation of the framers of the statute. I thought that the impossibility of exacting from the English debtor what the statute required, was evidence that the statute respected not such debtor.

1772. August 1. SIR LUDOVIC GRANT and OTHERS, *against* EARL of FIFE and OTHERS.

MEMBER OF PARLIAMENT.

Reduction of a decree of valuation.

[*Faculty Collection*, VI. 65 ; *Dictionary*, 8656.]

AUCHINLECK. Ground is not surely the worse for being turned into a garden. Two men swear to what two other men swore. I like not this proof by progress. It is impossible, without further proof, to determine what the witnesses mean.

COALSTON. As to the question, How far the rents of gardens are to be taken *in computo*—the words of the statute are very extensive ; all profits of lands were to be valued. Casual rents must be valued : a garden produces a casual rent.

PITFOUR. Whenever we have the original valuation, that must be the rule. In a question upon the old extent, a mill was found not to be comprehended, because it was proved that mills were not extended. If the garden was originally deducted from the valuation, it should not come *in computo* now.

ALEMORE. A garden of any considerable extent is to be reckoned as a subject having a constant value. A small garden may perhaps have been passed over unobserved by the valuers.

PRESIDENT. The great difficulty of all is, that the valuation on which the last valuers founded, was not upon oath : it bears in its bosom to have been nothing more than a declaration. Two men *swearing* to what two other men declared, can never be evidence.

On the 1st August, (or 31st July,) 1772, "The Lords reduced the division of the valuation ;" and, 11th August 1772, adhered.

Act. A. Lockhart, &c. *Att.* Hay Campbell, &c.
Reporter, Stonefield.

N.B.—The decret was reduced on the grounds suggested by the President, which had escaped the observation of the pursuer's lawyers. The question as to gardens was not determined.

1772. November 20. MINISTER of KIRK-SESSION of ECKFORD against JOHN ADAMSON.

POOR—JURISDICTION.

Sheriff has no power to fix the *quantum* of Parochial Aliment to indigent persons out of the Poor's Funds, and pass decree therefor, in the first instance.

[*Fac. Coll.*, VI. 73; *Dictionary*, 7669 and 10,577.]

PITFOUR. Our conduct, as to the poor, is regulated by the proclamations in the reign of King William. The Sheriff has power to supply what the heritors have omitted. I desire not to see either the state of the funds or the state of the poor in the parish. It is enough for me to see, that the parish gives this man but eighteen-pence a-week, which is not a sufficient maintenance. I would let him have what the Sheriff has decerned, reserving to him to apply hereafter for an addition.

HAILES. According to Lord Pitfour's principles, he must allow that this Court must first of all ordain an account of charge and discharge on Adamson's trade of eggs, that it may be known whether eighteen-pence, and the profits of his trade, are not sufficient for his maintenance.

KENNET. The establishment of poor in this country is better than in England, for that they who pay the expense of the poor see to the application of the payment. The Sheriff has no power in this matter, in the first instance.

KAIMES. If Lord Pitfour's parish maintained its poor, he would not have given the opinion he has given. The only check which we have against profligacy, consists in the power of the kirk-session and heritors to distribute the parochial charity among those who are real objects of that charity.

COALSTON. There is no doubt that the heritors and the kirk-session, here, have a power of laying on such taxation as is necessary for alimentering the poor. If they either neglect the poor in general, or particular persons among the poor, there is a remedy by the proclamations; but that is not the case here. The Sheriff directly decerned for an aliment, without allowing the heritors and kirk-session to judge in the first instance.

GARDENSTON. The Sheriff's decree is totally inept. He went ridiculously out of his road. There is no law in this country authorising an action for charity.

PRESIDENT. I wish the person who spirited Adamson to this action were a party, that we might find him liable in expenses; which he well deserves to pay, for contradicting the established rules of national police.

On the 20th November 1772, "The Lords reduced the decree of the Sheriff; and, in respect that the defender is on the poor's-roll, found no expenses due."

Act. Adam Ogilvy. *Alt.* Absent.
Diss. Pitfour.

1772. July 21. ELIZABETH WINTER *against* CREDITORS of JOHN ROY, Baker in Perth.

BANKRUPT.

THE pursuer was married to John Roy in the year 1759. Some time afterwards they executed a postnuptial contract, by which, failing children, they settled the common estate of both upon the survivor; reserving power to themselves, with mutual consent, to make and secure such provisions as they should think proper for the children of the marriage. In 1760, the pursuer was compelled, by maltreatment, to leave her husband's house. Upon this, the husband, alleging that the postnuptial deed had been unfairly obtained, brought an action of reduction against the pursuer and her father, for the purpose of setting it aside. On the other hand, the pursuer brought a process of aliment against her husband; and, on the dependance, used arrestments in the hands of Sandieman and Company of Perth.

On the 31st of July 1762, a proof was allowed to both parties; and, in the meantime, the Court found the pursuer entitled to an interim aliment, and modified the same to L.40 Scots, to the 1st of February following.

The husband failed in his proof, and the reduction at his instance was dismissed. In the process of aliment, the Court appointed condescendences of the effects and debts of the said John Roy to be given in. In the husband's condescendence it was stated, "that the only fund belonging to him, was L.196 : 7 : 8, which was lodged in the hands of Bailie David Sandieman, merchant in Perth, at 4 per cent., by order of the Sheriff of Perth, out of which there was a preferable annuity, payable to Catherine Graham, the said John Roy's mother, of L.100 Scots, which more than exhausted the interest." He further stated, that he owed debts to the extent of L.156 : 8 : 6, besides interest, in security of which, most of the creditors had arrested in the hands of Bailie Sandieman.

The pursuer denied the accuracy of this statement of her husband's funds; but no evidence was brought to disprove it. The process having fallen asleep, it was wakened in 1770, after the death of Catherine Graham; and Bailie Sandieman, at the same time, called the different arresters into the field in a multipointing.

The husband's creditors admitted that, for the interim aliment of L.40 Scots modified to the pursuer in 1762, she was entitled to be preferred according to the date of her arrestment; but they maintained, that, as the husband was insolvent, the pursuer's claim of aliment could not now compete with the claims of onerous creditors upon the fund *in medio*.

The Lord Ordinary, "Considering that the husband was admitted to be insolvent, desired to hear parties on the following point:—Whether a claim of aliment, supposing *parata executio*, is entitled to compete with onerous creditors?" And his Lordship afterwards found, "That the wife of John Roy, the common debtor, can only compete with the onerous creditors of her husband, to the extent of L.40 Scots, modified to her by the Court."

The case was afterwards stated to the Court in memorials.

PLEADED BY THE PURSUER :—

A wife maltreated by her husband, and compelled to leave his house, has an undoubted claim against him for aliment. For this she is a proper creditor of her husband, and may compete either with prior or posterior creditors. Stair, i, 4, 9; Bankton, i, 5, 91. The pursuer's arrestment, being first in date, is preferable to the others.

ANSWERED FOR THE CREDITORS :—

The fund *in medio*, which is the husband's only fund, is exhausted by the claims of his onerous creditors; and, from the very nature of the thing, a wife's claim of aliment, however well founded in itself, and in a question with the husband, cannot compete with them. The husband, it is true, is bound to aliment his wife; but this can only be fulfilled when he has funds of his own, which he has not when his debts exceed his means of paying them: *New-grange* against *Scott*, 10th November 1687; *Turnbull*, 25th November 1769.

The following opinions were delivered :—

1772. July 21. MONBODDO. The decision *Robertson*, in 1738, is a good decision, and applies to this case. When the husband treats the wife in such a way as to entitle her to an aliment, it is the same thing as if he had become bound to grant her a provision.

PITFOUR. The husband, by maltreating the wife, *delinquendo contraxit*. The decision 1738, *Robertson*, was pronounced by Lord Arniston, was approved of, and has always been held as good law.

COALSTON. A husband is under an obligation, both natural and civil, to aliment his wife; but this obligation cannot compete with creditors. While they live together, the wife must follow the fortunes of the husband. Even the rents of her own estate must go to the husband: if there is a separation, the wife is entitled to an aliment; but the extent of it must depend upon the state of the husband's affairs at the time of the maltreatment being proved. She cannot compete with creditors. Even the husband has *beneficium competentiæ*: no one is so bound to aliment another as to starve himself. For future aliments a wife may compete with creditors, but not *retro*. The consequence of the pursuer's plea is, That the commencement of a process for aliment shall have a stronger effect than inhibition, or any other diligence of the law.

KAIMES. An aliment given by a husband *vergens ad inopiam* will not compete with creditors. But when a wife is maltreated, and the aliment is fixed, she will compete with creditors. *Here*, upon a depending process of maltreatment, the wife arrested. At that time the husband was not bankrupt: the cause has been accidentally delayed, and, now he is bankrupt, the arrestment will entitle her to a right of competition.

AUCHINLECK. If a woman brings an action for aliment, she may affect her husband's subjects by arrestment, &c. for securing her aliment. Were it not for this, a husband might, from mere malice, dilapidate his effects.

COALSTON. If children bring an action against their father, to lend out and employ, and use arrestment, this will be good against the father, but not

against the creditors of the father. The diligence must always partake of the nature of the obligation on which it is used : so also in the present case.

PRESIDENT. The moment that the husband maltreats the wife, he is bound to aliment her. Some time may be spent before the aliment is found due. The wife arrests. This will draw back to the constitution of the obligation, if I may so speak.

PITFOUR. The diligence will not make the obligation better than it was ; but then it must be remarked that the obligation takes its rise from the time of the delict.

ALEMORE. This is not an action arising from a debt *ex delicto*, nor for damages, but to enforce a natural obligation. The answer of the husband is, I am willing to aliment you, if you will live with me. The reply is, I dare not, because of maltreatment. The conclusion is, that the husband must provide a separate aliment. The condition of the parties at the commencement of the action must be considered ; the aliment will draw back, and consequently the arrestment will secure it.

KENNET. The condition of children is very different from that of a wife seeking aliment. Children are as much heirs as creditors, and cannot compete with onerous creditors ; but the wife claims as creditor.

On the 21st July 1772, the Lords found the wife preferable for her aliment from the date of arrestment.

Act. B. M'Leod, D. Rae. *Alt.* D. Græme.

Reporter, Kaimes.

Diss. Coalston, Elliock, Stonefield, Hailes.

The creditors petitioned against this judgment ; and, on advising the petition and answers, the following opinions were delivered :

1772. November 21. MONBODDO. No doubt that the wife is preferable for aliment due at the date of the arrestment, and also for aliment due at the date of the competition ; but I would not prefer her in time to come. Arrestment cannot affect annualrents in time to come. So it was determined in 1739.

COALSTON. By the law of Scotland, a husband is under an obligation, both natural and legal, to aliment his wife ; but this obligation is of such a nature as not to compete with creditors. The aliment must be suitable to the circumstances of the husband : if his funds are exhausted, no aliment will be given. After decret, on account of maltreatment by the husband, the wife may compete with creditors. Arrestment after decret will secure her both as to by-gones and in time coming. Every diligence must follow the nature of the obligation on which it is used. The obligation of the husband, towards his wife, is of such a nature as not to compete with onerous creditors until it is constituted by decret. In the case of provisions to children of the marriage, they cannot compete with creditors : hence inhibition will only secure, not increase the obligation.

PITFOUR. In considering of an aliment, we must consider the situation of affairs at the time of bringing the action.

GARDENSTON. A party is dilatory in conducting a process. That cannot affect the state of things as it is at the issue of the process. The husband and his creditors may say the debts are now increased. We must determine the aliment according to the state of the funds at the time of the decreet.

KAIMES. If the husband cannot maintain himself, how can we force him to maintain his wife? There was a claim of debts *ten* years ago, but no decreet. Until decreet, there is nothing more than a claim of debt.

PITFOUR. Here there was not merely a demand for aliment, but gross maltreatment proved, and diligence done upon this.

JUSTICE-CLERK. A process for aliment being brought, at what time is the Court to determine the *quantum* of the aliment? The process does not divest the husband of his property, nor puts any man *in mala fide* to contract with him. The arrestment does not vary the rule for ascertaining the aliment: the rule must still be the quantity of the husband's free effects.

PRESIDENT. The natural obligation cannot compete with debts. As soon as the aliment is constituted, this comes to be an obligation: but it is impossible to hold the action for aliment as equal to a debt.

ALVA. I think that the wife had a hold of the subject *in medio* by means of the arrestment, and is thereby preferable to the after contractions with creditors.

On the 21st November 1772, the Lords preferred the creditors, altering their former interlocutor.

Act. D. Rae. *Alt.* D. Græme, A. Lockhart.

Diss. Pitfour, Alva, (and in part, Monboddoo.)

1772. December 1. MARGARET SCRUTON *against* JOHN GRAY.

FORUM COMPETENS.

The Commissary Court of Edinburgh not competent to a declarator of marriage against a person who had been some time resident here attending the colleges, not a native of Scotland, nor within it at the time of citation by affixing copies on the market-cross of Edinburgh, pier and shore of Leith, there being no *termini habiles* for a founded jurisdiction *ratione domicilii vel contractus*; and an arrestment in the hands of his late landlord, who acknowledged having in his custody certain moveables of no great value, used *ad fundandum jurisdictionem ratione rei sitæ* being deemed insufficient to produce that effect, in an action not of debt, but purely declaratory.

[*Faculty Collection*, VI. 88; *Dictionary*, 4,822.]

HAILES. By the law of Scotland, marriage may be proved from consent, without the intervention either of church or state. This is not derived from liberal principles of policy, nor from generous maxims, with regard to the constitution and interpretation of contracts, but from a fouler source, from the

rules of the canon law, as it stood before the era of the Council of Trent. Marriage by consent is valid with us, because it was valid by the ancient canon law. The Romish clergy, assembled at the Council of Trent, saw the evil consequences arising from this latitude in the constituting of marriage. They therefore introduced a reformation, and by *Sess. 24, c. 1, De Refor. Matrim.* required the *sacerdotal benediction*, as necessary to the essence of matrimony. Some feeble attempts were made by provincial synods in Scotland to introduce the canons of the Council of Trent. But the reformation from Popery immediately ensued, and the Council of Trent was no more thought of unless with execration.

Thus, at our Reformation, the canon law, as it stood before the Council of Trent, continued to be the law of Scotland, in this, as in other matters consistorial, unless so far as altered by statute.

In the nations where the Council of Trent was received, the *sacerdotal benediction* became of the essence of marriage,

Other nations modified marriage in different ways.

In France, a proclamation of banns was superadded to the *sacerdotal benediction*.

In the United Provinces, *the previous approbation of the civil power* was required.

In England, the *sacerdotal benediction* seems to have been sufficient, till a late statute required further solemnities.

In a word, all the European nations, Scotland only excepted, have departed from the more ancient canon law, and have required the interposition either of church or of state, or of both, to validate a marriage.

Thus, what was the law of all Europe, while Europe was barbarous, is now the law of Scotland only, when Europe has become civilized.

Notwithstanding the latitude in marriage permitted with us, though reprobated and exploded in every other country of Europe, we still acknowledge a distinction between marriages regular and irregular.

From the very dawn of the Reformation, marriage by a minister, after proclamation of banns, was the ordinance of the church.

This we learnt from the Geneva model: we find it in the First Book of Discipline, and in the Acts of the General Assembly, 1638. This became the ordinance of the state in 1641, (c. 8.)

The statute 1641 was rescinded at the Restoration, but was repeated in the statute 1661, c. 34; and this is the statute law of Scotland at this day.

Thus we see that there are two sorts of marriage in Scotland, and I hope the distinction will be remembered.

The one is regular by a minister after proclamation of banns,—the other, in whatever way it may be subdivided, is destitute of those solemnities, and is irregular.

A woman, regularly married, has no occasion for a declarator of marriage, for the public officer certifies her marriage, which is a fact of public notoriety. This will entitle her in Scotland, and as far as the jurisdiction of our Courts reaches, to all the five valuable things mentioned by the pursuer: 1. The husband's rank. 2. Exemption from personal diligence. 3. Aliment from the husband if



she needs it, if he can afford it, and if our Courts can make it effectual. 4. The chance of a jointure. 5. And, which is of most value, the reputation of a virtuous woman.

If, after such regular marriage, the husband should desert his wife and leave Scotland, the wife has all the remedies which the nature of the thing admits.

In such circumstances, an action for declaring the marriage would be unnecessary; for an extracted decree of the commissaries could never have more effect than the extract of the instrument of her marriage, on which such decree must proceed.

But, if a woman marries irregularly, it is not strange that the law should not always have power enough to secure her valuable interests.

Brower, *de Jure Connubiorum*, says, in a case somewhat similar, *debuît pudicitiam melius tueri*. If she chooses to enter into a connexion which cannot be ascertained unless by declarators and proofs; if she chooses to associate with a stranger, and to rely upon her own charms, the strength of his passion, and his fair promises, she must submit to the inconvenience of an action. As a pursuer, she must seek the defender where he is to be found. In this case, she must seek him in Ireland.

I see that the Court went much farther in the case of *Rebecca Dods* against *Westcomb*, 1745. From the state of that case, as read to us, I see that the Court did not proceed upon the notion of a jurisdiction, *ratione contractus*, but that it proceeded upon a notion of expediency, that the *status* of the pursuer might be ascertained.

This is the more remarkable, because there is an express text in the civil law which says, "*in status etiam quæstione actor rei forum sequi debet.*" C. 3, Cod. *ubi in causa status agi debeat*.

I cannot much regard a single decision pronounced in a *quæstio status*, against a maxim of the civil law, merely upon a ground of expediency, and this the more especially, because we know what the Court did not know at that time, that Rebecca Dods could take nothing which she meant to take by that decision. I cannot relish the doctrine that, because the pursuer concludes in *one libel* to have a proof of her marriage, and to have an aliment ascertained, that, therefore, an *arrestum jurisdictionis fundandæ causa* will be effectual, as the ground-work of both her conclusions against the man as well as the goods.

It seems plain that here there are two separate actions in one libel. Nothing more frequent with us in civil libels than *cumulatio actionum*. The slightest connexion justifies the *cumulatio actionum* even in criminal libels.

A declarator of marriage does not necessarily imply a conclusion for aliment.

The woman may have no occasion for aliment, and the man may have none to give her.

Suppose that Margaret Scruton had been an Irish heiress sent to Glasgow for her education, and that she had now returned to her native country, and that this action were at the instance of John Gray, still in this country, against her for adherence; in such case there would be no conclusion for aliment, and an *arrestum jurisdictionis fundandæ causa* would have neither reason nor consequences.

An action, at the instance of the man against the woman, and of the woman against the man, must be upon the same principles.

I admit that the extent of moveables arrested makes no difference.

A bag, containing ten thousand guineas, and a single toothpick at a penny the dozen, are equally moveables,—equally arrestable; and will go equally in payment of the debt if the evidence of the debt is once established.

But the infinite minuteness of the subjects which may be arrested *jurisdictionis fundandæ causa*, leads me to doubt of the extensive effects which the pursuer holds to be consequent on such arrestment.

No man ever resided in a foreign country without leaving some moveables behind him, either because he thought them not worth the conveying away, or because he forgot them, or because he had put them in the hands of persons who neglected to return them.

There is reason in that fiction of law which renders such moveables attachable by creditors.

But it would be a very wide stretch of this fiction, were we to suppose that the presence of an old hat had all the effects of the presence of the living proprietor.

In this case, Margaret Scruton cannot, in my apprehension, attain the property of John Gray's old hat, because this can only be attained by her proving her property in his person.

This she cannot do; because John Gray cannot be present to hear and see it so determined.

I conclude in the words of Noodt, *de Judiciis*, page 147: "*Constituatur iudicium ex tribus: ex actore qui petat, ex reo a quo petatur, et iudice qui inter utrumq. sedeat medius. Absente una ex tribus personis non est iudicium: fac deficere eum qui petat, aut unde petatur, non est; ideoq. nec iudice nec iudicio opus.*"

MONBODDO. The citation at pier and shore is not very ancient. From the apprising quoted in 1547, it appears that the former mode of citation was at the head burgh of the shire where the party last resided. The *arrestum jurisdictionis fundandæ causa* is also a new form in the law of Scotland. It is different from the attachment in *Quon. Attach.* which was not in order to give jurisdiction, but in order to secure it. It is not to be found in Balfour: hence I fairly conclude that the form has been introduced since the days of Balfour. Voet says, it is a *barbarous term*; I think that it is a *barbarous thing*, contrary to the principles of law. The only arrestment effectual must be that of *res sita*. But here there is no *res sita* to give a *forum*. If Gray had had goods in Scotland, by way of traffic, the arrestment might give a *forum*, at least in a question of debt; otherwise no foreigner could be in Scotland for twenty-four hours without having a *forum*. There is nothing here which any passenger may not have. There is a distinction between an *arrestum* on a claim of debt and on a *quæstio status*. It is long since I learned the distinction between the rights of persons, things, and actions. The authorities urged from the bar point at this distinction. The pursuer has herself to blame if she is brought under any inconvenience. She should either have made her marriage public, or she should have arrested the young man's person. The decision in the case of *Westcomb* is erroneous, proceeding upon the expediency of trying a *quæstio status* in the forum of the actor.

AUCHINLECK. In general, the rule is, that *actor sequitur forum rei*; but here there is a specialty. The pursuer, who says she is married, has an inter-

est to have that fact ascertained for her own reputation. She would be entitled to try this, although she did not know the name of the party. This shows that the contract concerning marriage is different from all other contracts. The pursuer is not entitled to prevail in a declarator for having it ascertained that the man shall maintain her : all that she is entitled to, is, that her *status* be ascertained.

KAIMES. The rule in law, that *actor sequitur forum rei*, is not an arbitrary rule, but is founded on truth and necessity. We cannot call a man into Court, over whom we have no power. The very citation, in such case, is void, intrinsically, fundamentally, and radically. If a stranger enter into a covenant in this country, his goods in this country may be subjected to the implement of the contract. Here the very question in agitation is, Whether there is a contract or not? The allegation of a contract will not found a jurisdiction. As to the *arrestum jurisdictionis fundandæ causæ*, the notion of an *arrest* presupposes a jurisdiction : so that it is a contradiction to hold that John Gray is in this country, because his goods are arrested. The sense of the arrest is, that the goods may not be conveyed out of the jurisdiction. As to what Lord Auchinleck says, that there may be a declarator of a *quæstio status*, independent of a declarator of marriage ; if the evidence of marriage is in danger of perishing, the pursuer may apply to the commissaries, that her *status* may be ascertained. This, however, will not apply to the present case, which is simply a declarator of marriage, with conclusions of adherence and aliment.

KENNET. The *forum contractus* is out of the question ; because *reus non est inventus* within the territory. As to *forum status*, I know no such *forum*. How can there be a *forum* without a *reus*? A declarator without a defender would conclude nothing. Mr Gray has as good a right to try his *status* in Ireland as Miss Scruton has to try hers in Scotland. This would be the occasion of an inextricable collision of jurisdiction. The case of a woman marrying a man whom she knows not, must be rare. If one has a bill upon a person whom he knows not, he must lose his debt ; and there is no help for it. The only difficulty is as to *arrestum jurisdictionis fundandæ causæ* : That arrest was introduced, says Voet, for the benefit of merchants. He speaks very generally of its effects ; but he admits that the arrest will not carry immoveables in another country. We cannot carry an action of expediency farther than the expediency requires.

COALSTON. It is highly improper, in this case, to listen to arguments of favour. We must suppose that the pursuer can prove her *libel*. The only question is, whether we can allow that proof? This question, as to marriage in Scotland, ought to be determined by the law of Scotland. Wherever it is determined, it is necessary, in all cases, that there should be a defender as well as a pursuer. I should have had great difficulty in Westcomb's case. In such case a legal remedy may be devised. Rebecca Dods, being pursued for a debt, might have pleaded that she was a married woman ; and the Court would have allowed the proof of this plea, because there would have been a contradictor. The difficulty arises from the *arrestum jurisdictionis fundandæ causæ*. It is an established point, that every judge has a jurisdiction over persons and things within his own territory. This is admitted as to immoveable subjects : a jurisdiction implies a power for extricating it. Jurisdiction cannot be

extricated as to moveables without affecting the person. If the woman might declare her marriage, when the man had a land estate in this country, why should there be a difference when he has moveables, not a land estate? As soon as commerce prevailed, it was necessary that there should be executorials of the law, in order to render the moveables forthcoming to creditors. When goods are once put in the situation of a landed estate, all the rules relating to a land-estate must apply to them. There can be no distinction from the value of the goods arrested: I do not like an action founded upon moveables of small moment; but I do not see how the value of the goods arrested can enter into the question of jurisdiction. Suppose the pursuer had brought an action, and concluded singly for aliment, and required the goods to be made forthcoming, the action would have been good. How can we distinguish between that and the present action?

GARDENSTON. I cannot understand an abstract declarator of marriage against an invisible husband; neither do I enter into the question, whether the law of Scotland ought to be the rule in determining the marriage, when an action is brought in another country. The single question here is as to jurisdiction. The rule is, *extra territorium jus dicenti impune non paretur*. When the goods of a stranger are found in this country, there is a jurisdiction as to the goods. When the person is not within the territory, there is no jurisdiction over his person. Here there is not an action for payment of a debt constituted, but for a personal decree: a decree is sought against the person, in order to pave the way for a decret against his effects. The case of Westcomb proves a great deal too much: I can hardly believe that all the judges were of one mind then. None of us would go that length now.

JUSTICE-CLERK. All the authorities quoted speak the same language, that *locus contractus* does not establish a *forum*, in the absence of the party. If I can read the language of the Roman law, there was no such thing as *arrestum jurisdictionis fundandæ causa* among the Romans. It was introduced for the conveniency of commerce. A jurisdiction over the goods does not imply a jurisdiction over the person. Here are two jurisdictions quite compatible. The person is subject to his own *forum* where he is; the goods subject to the forum where they are. Here there is a conclusion against the person, not merely against the goods: a personal action is altogether detached from the goods. The grounds and principles for which *arrestum jurisdictionis fundandæ causa* was introduced, apply not here. As to the expediency of trying a *quæstio status* here; every person has a right to declare his state in his own country, wherever he has an interest and a proper contradictor. Thus, a brief might be taken out by the son of Margaret Scruton, to prove himself her lawful son. This is not trying the *quæstio status* with John Gray. It could have no effect against him, as containing no conclusion against him. The woman may declare her own *status*, but not his. This last, however, is the import of the present action. The contrary doctrine would overturn all the partition-walls of jurisdiction. By the same rule that Margaret Scruton declares her marriage, she might declare a divorce for the adultery of the man. Thus, also, declarators of filiation among foreigners might take place here.

ALVA. *Arrestum jurisdictionis fundandæ causa* can only have the effect of

making forthcoming the goods demanded upon an antecedent claim of debt, but will not touch the person. The principal object is to affect the man, not his goods.

PRESIDENT. I will only touch upon what I have heard from the bench, as I did not hear the bar. There is no such thing as a declarator without a party contradictor. If any inconveniency here to the pursuer, it is from her own fault in not marrying regularly. She may prosecute her action in Ireland, where the defender resides. In this she will have every assistance from the judges, in this country, for bringing forward her evidence. As to the parallel between moveables and an immovable estate, *arrestum jurisdictionis fundandæ causa* gives only an attachment with respect to the goods: the proprietor of the goods still remains an alien. An alien cannot succeed to an estate in this country: If he purchases an estate, he becomes an absolute citizen of Scotland. But attachment of moveables makes him not a citizen of Scotland.

On the 1st December 1772, "The Lords remitted to the commissaries, with this instruction, that they sustain the objection of declinature. But, in respect of the new objection, stated by the pursuer, that the defender was within Scotland at the time of executing the summons, they also remitted that point to the commissaries to be tried by them."

Reporter, Kennet; and afterwards hearing in presence.

Act. G. Wallace, Sir John Dalrymple, A. Lockhart.

Alt. J. Boswell, Ilay Campbell, J. Montgomery.

Diss. Auchinleck, Coalston.

1772. December 1. ALEXANDER M'KENZIE *against* DEWAR and DUNCAN M'FARLANE.

HERITABLE AND MOVEABLE.

A process instituted, *stante matrimonio*, upon a bond bearing interest that was due to a woman at the time of her marriage, has not the effect to render the sum moveable *quoad* the husband, and affectable by his creditors-arresters.

[*Fac. Coll. VI. 90; Dict. 5778.*]

PITFOUR. The raising summons, and even obtaining decret, will not vary the nature of the debt. There are some old decisions which may seem to speak a different language. They proceed upon presumptions of intention, which are exceedingly arbitrary. I never liked those decisions.

KAIMES. Intention is the prevailing rule, but is not to be extended beyond what is necessary.

COALSTON. When a woman pursues for payment of a debt heritably se-

cured, she may either intend to re-employ the money, or to gift it to her husband. *Donatio non presumitur* ; therefore she must be presumed to have meant to re-employ it.

GARDENSTON. The strongest evidence of intention would not do : an assignation to the husband would have been infinitely stronger than the action, and yet the assignation would have been revocable as long as the money remained unpaid.

PRESIDENT. In so far as the wife uplifted, and did not employ, the money, if extant, would be moveable ; not so to what has not been uplifted.

On the 1st December, 1772, the Lords preferred the wife ; altering Lord Alva's interlocutor.

Act. Ilay Campbell. *Alt.* A. Bruce.

1772. December 4. JUSTICES OF PEACE of CLACKMANNANSHIRE *against* The
MAGISTRATES of STIRLING and THOMAS CAMPBELL.

HIGHWAY—JURISDICTION.

Omission of the requisites in Act 1669, c. 16, previous to an order of the Justices of the Peace, for the change of the road, fatal to the proceedings.

[*Faculty Collection*, VI. 101 ; *Dictionary*, 7619.]

HAILES. I have no doubt of the upright and public spirit of the Justices ; but their public spirit must be limited by law. There is nothing more apt to check public spirit than statutes, yet this can only be remedied by more statutes. I think that the present road, properly widened and repaired, may be just as good as the rest of the roads of the country. I also doubt how far the Justices can turn about a road more than 200 yards because it thereby becomes shorter to some of the inhabitants of the country. This is no reason, for that it must always happen from the nature of the thing.

GARDENSTON. The Act, 1669, ought to be liberally interpreted. If the old road *cannot well be continued*, there is a discretionary power of alteration. I doubt, however, of the application of the maxim to this case. The suspender offers ground sufficient to make the old road wide and safe : the new road cuts his property unmercifully in pieces.

PRESIDENT. I do not dispute the powers of the Justices, but here they have been too precipitate. The law requires that, first of all, the damage should be ascertained, instead of leaving this to be adjusted after the damage is done.

JUSTICE-CLERK. Public utility is not apparent in this case : As the Justices may turn about the road *a fortiori*, they may widen it. They have turned the road without attempting to widen it.

COALSTON. The powers of Justices of the Peace are liberal, but not arbi-

trary. The only objection not obviated is a new one, that the road may be washed away. This also may be obviated by going so much farther back into Mr Campbell's ground, without ruining his inclosures and intersecting his little property.

On the 4th December 1772, "In respect that the decret does not proceed upon sufficient evidence of the necessity of changing the road, and that the damages were not previously ascertained, the Lords suspended the letters, reserving to the Justices again to take the matter under their consideration and to proceed according to the Act 1669."

Act. H. Dundas. *Alt.* A. Lockhart. *Reporter,* Coalston.

1772. December 9.

PUBLIC OFFICER.

Validity of a commission to a party and his son, as conjunct clerks ; with a survivancy.

In the Teind Court, upon production of a commission to Mr Joseph Williamson and his son, as conjunct clerks, with a survivancy, a question occurred as to the validity of the commission.

COALSTON. I would have moved for remonstrating to the King, had this been the first case of the kind ; but I see evidence of practice.

HAILES. Since we are to receive the commission, let it be upon a preamble of the practice, that posterity may be put upon its guard.

ELLIOCK. A preamble will serve no purpose, because what is done in the Teind Court will be no notification in any other.

PRESIDENT. The practice proved in other courts or offices, affects not me. My opinion is, that, in matters where judgment is required, there can be neither conjunction nor survivancy. *Here* the office is merely ministerial.

The Lords having considered the precedents produced, and that the office is purely ministerial, and that Mr Williamson's commission gave a power of deputation, ordered the commission to be received.

1772. December 10. JOHN ROBERTSON *against* JAMES WATSON.

HUSBAND AND WIFE.

A Married Woman's personal obligation in an heritable bond, subjoined to which, as a corroborative security, she came under an obligation likewise to infest the creditor in a subject properly belonging to herself, not effectual to be the foundation of a process of adjudication against her heir.

[*Faculty Collection, VI. 107; Dictionary, 5976.*]

AUCHINLECK. If a woman should sell her estate, and there is a defect in the progress, may there not be an adjudication in implement?

PITFOUR. There is no doubt that a wife, with consent of her husband, may sell or grant an heritable bond: this consent is necessary, though his *jus mariti* or courtesy be not affected. But a wife, even with consent of her husband, cannot do an obligatory deed. The right, here, is not capable of adjudication, for the adjudication can only proceed upon the personal obligation, which is null.

COALSTON. A personal obligation by a wife is null, and cannot found an adjudication. A wife may do deeds to affect her estate. If she grants an obligation to dispoise, that may be made effectual by an adjudication in implement; but the case here is different. *1st*, There is an obligation to pay; *2d*, An infestment in annualrent. The last will be effectual, but it will not authorise an adjudication.

GARDENSTON. The real obligation is good; why may it not be made effectual by adjudication? I have no notion of a right which cannot be carried into execution by legal diligence.

MONBODDO. This was just the principle of my judgment. I thought that it was the implied obligation, in the heritable bond, that the creditor should either have his money or be allowed to do diligence against the estate. Every person that grants an heritable bond becomes virtually bound in this alternative.

JUSTICE-CLERK. At first I thought that this was no more than a quirk on the part of the wife's heir. We are agreed that the personal obligation by the wife is good for nothing, and that the wife may grant real rights with consent of her husband. The question here is, how far an adjudication can be led upon the heritable bond? The law will not suffer the wife to affect her lands beyond what she is specially bound to do. The infestment on the heritable bond is perfectly good, so far as it goes; but the wife has not consented that her estate shall be liable to adjudications, to an expired legal, &c.; therefore, the law will not suffer an adjudication to carry off her estate.

PITFOUR. This may be expressed in brief thus:—The maxim of law is, that

an adjudication proceeds on this, that the debtor had become bound to pay, and had neglected to fulfil his personal obligation. There was no personal obligation on the wife, and therefore an adjudication cannot proceed against her lands.

On the 10th December 1772, "The Lords found that the adjudication cannot proceed on the personal obligation of the wife, and therefore sustained the defences, and assoilyied;" altering the interlocutor of Lord Monboddo.

Act. J. Douglas. *Alt.* J. M'Laurin.

1772. December 10. JOHN HEPBURN and WILLIAM CHEAP *against* GEORGE AIKMAN.

SALE.

Case where a purchaser of an heritable subject was held bound, either to accept of the disposition, and progress offered, or to depart from the bargain.

[*Fac. Coll.* VI. 103; *Dict.* 14,179.]

PITFOUR. When I was consulted as to defects in progress, I always told the parties, You must either take the progress or quit the bargain. When they said they would not quit the bargain, because it was a good one; then I advised them to keep their charter-chests shut, and try to make a good title to themselves by the aid of prescription.

AUCHINLECK. The rule, *loco facti imprestabilis subit damnum et interesse*, only takes place when a purchaser is led ignorantly to buy the subject. Here Mr Cheap knew that the progress was bad, and indeed bought because he knew it was bad. If he prevails, he may call the tenement Cheap-House; for he will retain the price, and is in possession of the subject *qua* tacksman. After the purchase he is no longer tacksman, so will pay no rent. As the seller cannot give him a progress, he will retain the price in his own hands.

HAILES. If Mr Cheap will not say that the seller can complete a progress, he must submit to have the bargain set aside.

PRESIDENT. Here is a *factum imprestabile*: Mr Cheap does not say that the progress can be made better, neither does he say that he has suffered any damage. He has got into possession, and says that he will hold the subject, and not pay the price.

On the 10th December 1772, "The Lords found that Cheap must either take the subject or give up the bargain, and found expenses due;" altering Lord Kennet's interlocutor.

Act. J. M'Laurin. *Alt.* R. Sinclair.

1773. January 14. MARY M'PHERSON, Spouse of Edward M'Intosh of Borlum,—*Petitioner*.

HUSBAND AND WIFE.

[*Dictionary*, 6052.]

PRESIDENT. I see the necessity of the application, but I doubt of its being formal, as there is no process in Court; and as we do not know, in the capacity of Judges, that *Borlum* has left the country, I think that the proper way would be to present a bill of inhibition, and to have it passed *causa cognita*, upon proof being brought of the husband's absence. I therefore would remit to the Ordinary on the Bills, to whom the bill of inhibition may be presented accordingly.

On the 14th January 1773, "The Lords remitted the petition to the Ordinary on the Bills."

For the petitioner, Dav. Dalrymple.

1773. January 15. SIR WILLIAM FORBES and OTHERS *against* JAMES RAMSAY and OTHERS.

SALE.

[*Supp. V.* 583.]

MONBODDO. I did not think that so much could have been said for the pursuers in this case. Yet I am of the opinion of the interlocutor. Drummond was under no obligation to apply the materials pointed for finishing the houses of the pursuers. He remained proprietor of the materials, and consequently his creditors might point them. The pursuers might have charged Drummond on his contract, and then pointed the materials.

AUCHINLECK. Had the materials been lying in a carpenter's shop, there would have been no pretence for claiming them: there is as little *here*.

KAIMES. Had the materials been *in actu proximo* of being used, I should have had a doubt. Drummond would have been *in pessima fide* to sell the materials in controversy.

On the 15th January 1773, "the Lords found the pointing regular and effectual;" adhering to Lord Gardenston's interlocutor.

Act. Ilay Campbell. *Alt.* R. Cullen.

1773. January 19. ALEXANDER HUME of Coldingham *against* ALEXANDER DONALDSON.

PREScription.

The vicennial prescription, in terms of 1669, c. 9, of a holograph missive letter of relief, found to commence precisely from its date, and that the Act admits not of any latitude in that respect, even in a question with the heir of the creditor, pleading both ignorance of his right and that it was in its nature not an absolute obligation, but pendent upon a condition, and therefore the prescription could only begin to run from the time of the distress, as in the case of warrandice.

(*Faculty Collection*, VI. 122; *Dictionary*, 10,992.)

KAIMES. I doubt whether the vicennial prescription can take place while there was no distress. Besides Hume was *ab agendo*.

AUCHINLECK. The law distrusts such holograph obligations, and, therefore, after twenty years, holds them to be good for nothing, unless instructed by oath. The subsistence of such obligation depends on its age, not on the casual condition of the granter.

On the 19th January 1773, the Lords sustained the defence of vicennial prescription; adhering to Lord Stonefield's interlocutor.

Act. James Grant. *Alt.* John Douglas.

1773. January 19. ANDREW GARDINER *against* ROBERT EWING.

DECREET-ARBITRAL.

No good objection found to lie on the ground of defect of proper evidence of the arbiters' having differed in opinion, so as to make way for the decision of the oversman, against decret-arbitral pronounced by him; seeing that the decret bore a recital of his own appointment by the two arbiters, conform to a minute subscribed by them, naming him to be their oversman, in regard they could not precisely agree touching the decision to be pronounced with respect to the matter thereby submitted; his taking upon him the determination in that capacity, and his having, in conjunction with one of the arbiters, made choice of a clerk conform to another minute, subscribed by the said arbiter and him, and produced.

[*Dictionary*, 559.]

GARDENSTON. I am not satisfied with the decision in Dalrymple. It is suf-

ficient evidence of the arbiters having differed, that the oversman undertook the office. I would never overturn decreets-arbitral upon niceties of form. But I doubt as to the reference, as it is not a probative deed : such reference is, in effect, a new submission, and ought to have all the solemnities of a submission.

PRESIDENT. Lord Gardenston requires too much form in decreets-arbitral, while at the same time he would support the informal. The reference is an *actus legitimus*, and would have been good, even in the shape of a minute.

KAIMES. As to the case in Dalrymple, I presume the decreet-arbitral *there* was very iniquitous, and that the Court laid hold of every objection.

On the 19th January 1773, the Lords found the letters orderly proceeded ; adhering to Lord Stonefield's interlocutor.

Act. Hay Campbell. Act. W. Campbell.

1773. January 20. DOCTOR JOHN ROEBUCK and Company *against* WILLIAM and ALEXANDER STIRLINGS.

PRIVILEGE.

[*Fac. Coll. XIII. p. 218 ; Dictionary, App. I. ; Privil. No. 2, Note.*]

AUCHINLECK. The Ordinary did properly in passing the bill, without stopping the works, for the cause is not clear.

ALEMORE. It is a rule in law that every man is entitled to continue in possession of his rights till he is put out in form of law. There is no doubt of the king's power of granting the patent. Roebuck is in possession of the patent : he must not be turned out *brevi manu*, which he would be in a certain degree, were Messrs Stirlings allowed to prosecute their works.

GARDENSTON. I cannot agree to that part of the interlocutor which allows the work to go on. The very purpose of a suspension of a *novum opus* is to keep matters entire. There is no hardship in this, but there would be in the contrary.

KAIMES. Admitted that he could not recollect the ground of his interlocutor.

PRESIDENT. If other people *are de facto* in possession of the same sort of work, why stop Stirling ?

MONBODDO. If this were not *novum opus*, there might be difficulty.

JUSTICE-CLERK. The interlocutor of Lord Hailes was right as it related to the buildings. The interlocutor of Lord Kaimes was wrong as it related to the work. Roebuck and Company have done all that they could to certify and interpel : other persons who have got into possession may possibly not be stopt but by declarator ; Messrs Stirling may be by suspension.

On the 10th January 1773, "the Lords remitted to the Ordinary to pass the bill," in whole altering Lord Kaimes's interlocutor.

Act. A. Crosbie. *Alt.* A. Lockhart.

1772. November 20. PETER MACDONELL *against* DUNCAN CARMICHAEL and MESSRS BELL and RAINIE.

PERSONAL AND REAL.

In personal rights *fraus auctoris nocet successori*.

[*Faculty Collection*, VI. 75 ; *Dict.*, 4974.]

THE Court had no doubt that Carmichael was guilty of a gross fraud. The only question was, as to the assignation for onerous causes by Carmichael to Bell and Rainie.

PITFOUR. When the question is as to the conveyance of heritable rights, after infeftment, fraud does not affect singular successors. Neither does it in the transference of bills, and of moveables ; in the one case, from the security given to records, and in the other from necessities of commerce and society. But, in personal rights, I always understood that the exception of fraud is competent. This distinction is well laid down in Lord Bankton's *Institutes*, quoted for Macdonell.

KAIMES. Many grounds of exception are good against a purchaser. Rainie's right might possibly be sustained to the extent of the money actually advanced by him ; but it is to be considered that he did wrong to have any concern in this affair, for he might have been satisfied, from the assignation, that Carmichael was merely a trustee, and he ought not to have dealt with him as proprietor.

MONBODDO. There is no doubt that an assignation of a personal bond is challengeable upon any personal exception.

PRESIDENT. In the assignation of personal rights one purchases *periculo et utitur jure auctoris*. Great fraud would ensue were another rule introduced.

COALSTON. Macdonell was a weak man, and did very rash actions, both in granting the factory and the assignation ; but here the question is not with Carmichael, but with a singular successor. A creditor taking an assignation is liable, but not a purchaser. Our decisions are not uniform. There was a distinction in the Roman law between what was *labes realis* and what not ; here no *labes realis* in the sense of the Roman law.

On the 20th November 1772, the Lords sustained the reasons of reduction, and found expenses due against Carmichael, but not against Bell and Rainie.

Act. R. M'Queen. *For Bell and Rainie*, D. Dalrymple, R. Stonefield.
Non liquet, Coalston.

1773. *January 22.* MONBODDO. It is said that this point has never been decided. Points never decided are the strongest and most certain in our law. I think that the Roman law differs not from ours in this question. The texts cited clearly respect moveables, though Voet has understood them in another sense.

KAIMES. The difference between the case of *nomina debitorum* and the other cases, is this, and it is mentioned by Lord Stair,—An assignee is nothing else than *procurator in rem suam*. Hence, in England, at this day, an assignee must pursue in the name of his cedent. With us an assignee is now held to have the total right. In that respect the law has changed. Why should not the effects of assignments also be changed? For want of this change, our law is, in one particular, a sort of hotch-potch; but we cannot help that. Be this as it will, here is no assignment; for the cedent never, in truth, granted, or meant to grant, the assignment to Carmichael.

PITFOUR. By the Roman law, when property was once transferred, the maxim took place *dolus actoris non nocet*. In the case of *Whitefoord of Dundaff*, the Court adhered unanimously to the opinion of that great judge, Lord Newhall, and reduced a disposition elicited from Kennedy of Balterson, when drunk, in so far as the property was not vested in a third party by infestment. As to the rule in moveables; if you allow not the effect of *bona fides*, there can be no transactions between man and man. As to the bills, commerce requires the same security, from *bona fides*. There is nothing of this kind here. An assignment to a personal right gives no security: it is extinguishable by compensation, or by payment. In it the assignee wholly relies on the warrandice of the cedent. The case of a tack being found secure by a decision quoted, is right; for a tack is a real right *in suo genere*.

GARDENSTON. I think that the factory empowered Carmichael to assign. Though the factory is not mentioned in the assignment which he granted, yet every right in the cedent, even a supervenient one, accresces to the assignee.

MONBODDO. The factory was for the purpose of uplifting Glengarry's debt, or for borrowing; but, the debt being once uplifted, and vested in a bond, the factory would not have entitled Carmichael to uplift from William Fraser, the debtor in the bond.

PITFOUR. An executor may discharge, but he cannot assign.

JUSTICE-CLERK. The factory to uplift Glengarry's bond was no title to uplift Fraser's bond.

COALSTON. Had the factory been general, I should have had great doubt.

On the 22d January 1773, the Lords reduced, and adhered to their interlocutor of the 20th November 1772.

Act. R. M'Queen. *Alt.* H. Dundas.

Non liquet, Coalston.

1773. January 23. THOMAS JAMIESON DURHAM, Esq. *against* GEORGE HENDERSON.

TACK.

The exclusion of assignees and sub-tenants in a tack found to bar even a temporary assignment in security.

[*Fac. Coll. VI. 127; Dict. 15,283.*]

AUCHINLECK. Here there is plainly an assignation denuding the tenant. Unless a clause, *secluding assignees*, shall be found to import nothing, this assignation is ineffectual.

PITFOUR. The right here is no more than a temporary right of possession : it is no assignation.

[Before the Court sat down, Lord Pitfour spoke to me in favour of the tenant. I told him that my interlocutor had kept him right. Then, said he, *keep him right still*. I told the President of this extraordinary incident, being the first solicitation that I had ever received.]

GARDENSTON. I cannot reconcile this claim of the tenants with any principles of law. Parties, by giving the name of factory to an assignation, will not change the nature of the case. I do not approve of the conduct of the heritor. I would not act so were I in his circumstances : but we sit here to judge of the rights, not of the conduct of parties. My only difficulty is how we can remove the principal tenant. If he says he will go back to the possession, how can we hinder him.

KAIMES. The clauses bearing assignees and sub-tenants, were intended to prevent tacks from going from hand to hand in the way of bargain. The case of a bankruptcy was not adverted to, yet it has been found that a bankrupt tenant cannot assign. The deed in controversy is an assignation.

PRESIDENT. The exclusion of sub-tenants and assignees was a wise regulation : it was introduced when masters were liable for the delicts of tenants : besides, there is in tacks a *delectus personæ*. The deed here is an assignation.

On the 23d January 1773, the Lords found that the deed was an assignation in security, and therefore decerned in the removing.

Act. J. M'Laurin. Alt. Alex. Bruce. Rep. Stonefield.

10th February 1773, adhered, in respect that the judgment does not bar Livingston from entering into possession and stocking the farms.

1773. January 23. JOHN FINLAY against ROBERT SYM.

HYPOTHEC.

Writer's hypothec on his client's writings bars even demand of exhibition *in modum probationis* at the client's instance.

[*Faculty Collection*, VI. 13 ; *Dict.* 6,250.]

GARDENSTON. If this interlocutor were adhered to, the credit of the lieges would be hurt ; writers would not trust their clients. The answer, that the writings are only called for as in an exhibition, is not sufficient : this would be to make the writer merely a custodier of the papers. It is true, as the Ordinary expresses it, that this incidental question embarrasses the cause : but that is Finlay's fault ; he should have brought an action at first for his papers, and then the defence of hypothec would have occurred. His delay in bringing this action cannot alter the nature of Sym's defence.

KAIMES. Here the writer stands out against his own interest ; his payment depends on Finlay's success, and Finlay's success depends on the exhibition.

HAILES. I was so much prepossessed with the notion that Sym argued against his own interest, that I did not give sufficient attention to the *legal* defence, which I apprehend my interlocutor wounds. It is certain that Sym's only chance of payment depends on his waving his right of hypothec, and that, by gaining his cause, he will lose his money.

On the 23d January 1773, the Lords found that Sym has a right of hypothec for payment of his account, and that he is not obliged to exhibit the papers called for ; altering Lord Hailes's interlocutor.

Act. A. Crosbie. *Alt.* Cosmo Gordon.

1773. February 2. JOHN FINLAYSON against JOHN EWEN.

BILL.

To preserve recourse against an onerous indorsee on a bill passed by him in course of trade, the bill must be duly negotiated, whether the drawer was creditor or not to the person drawn on.

[*Faculty Collection*, VI. 136 ; *Dictionary*, 1,597.]

COALSTON. Had the question been with the drawer of the bill, the objection of undue negotiations would not have been good. The case is different when the question is with the indorsee.

PITFOUR. The decision in *Falconer*, 29th January 1751, where the contrary was found, is rightly reported by the Collector ; but that was the first judgment. The Court altered on a review.

GARDENSTON. The cases quoted in the petition are in point.

MONBODDO. I am glad to hear that it is held to be law, that the objection of undue negotiation is good in a question between the original creditor and the drawer. I do not see the difference between that case and this : every draught is an assignation,—every assignation supposes that *debitum subest*.

PRESIDENT. I lay the case upon the nature of bills, that an indorsee may take the benefit of the objection arising from an undue negotiation, though the drawers cannot.

On the 2d February 1773, the Lords found no recourse due, and therefore suspended the letters ; altering Lord Monboddo's interlocutor.

Act. G. B. Hepburn. *Alt.* W. M'Kenzie.

1773. February 16. JAMES CATHCART of Carbiestoun against JAMES ROCHEID of Inverleith.

HEIRS-PORCIONERS.

There is a distinction between heirs-portioners *ab intestato*, and heirs-portioners provisional, with respect to the *præcipuum* ; which, in the case of the latter, is not claimable in right of the eldest of four daughters, who were, failing a son, *nominatim* called to the succession equally amongst them.

[*Fac. Coll.* VI. 143 ; *Dictionary*, 5,375.]

AUCHINLECK. There is all the difference imaginable between an heir and a disponee. That here they happen to be the same persons, makes no difference : they do not claim as heirs : they must take as disponees.

MONBODDO. The distinction between disponee and heir is as ancient as any in the feudal law. But here the daughters take not as disponees, but as heirs, and make up a title as heirs by service. If they had been strangers, still the eldest heir-portioner would have had a right to the *præcipuum*. The eldest daughter of Sir James the younger would have had a right to a *præcipuum*, so also the daughters of Sir James the elder.

HAILES. It is hard for judges to determine impartially upon a point of law, when, from private knowledge, they are apprised of the sentiments of the parties ; which set aside the point of law altogether. The young gentlemen here know nothing of what happened before their own day. The truth is, that there are new buildings at Inverleith made by Colonel Cathcart and Mrs Rochied, exceeding the value of the old capital messuage and its appurtenances. It is impossible to suppose that Colonel Cathcart paid any more than one-fourth of the

expense of those buildings. Mrs Rocheid could never mean to pay three-fourths of the expense, in order to enlarge or create the Colonel's *præcipuum*.

KAIMES. I cannot enter into the distinction between heirs-portioners by disposition or by right of blood. It would be difficult to make any plain man understand it; but I doubt whether the eldest heir-portioner should at any time have the capital messuage without making recompense.

PRESIDENT. It is too late to go into that question. The case of *Peadie* is in point. It was solemnly determined in 1743. The rule there established was followed in the case of *Gowan* against *Ireland*.

ALVA. The right of *præcipuum* is not so much from the nature of the heir as from the nature of the subject.

GARDENSTON. In the case of proper heirs-portioners, the eldest is entitled to a *præcipuum* without retribution. The question is, Ought the same rule to be applied here, where to the rights of heirs-portioners is superadded a destination? Heirs-portioners succeed equally from the presumed will of the predecessor, yet the eldest has a *præcipuum* without recompense. So ought they to do here by the will of the testator.

PITFOUR. The general strain of our old law was to give a recompense. Towers and fortalices were excepted: other houses were of inconsiderable value. But when houses came to be of more value, sometimes exceeding the value of the estate, the Court began to perceive that, to give a recompense, would be to oblige the eldest heir-portioner either to quit the house or to quit the estate. Whenever a *pretium affectionis* comes in, there must be arbitrary questions and doubtful decisions. Of late there has been an acquiescence of the nation in the case of *Peadie*, &c., as judged by this Court. As the title here is made by service, I cannot see the distinction between heirs and disponees.

JUSTICE-CLERK. When a man makes no settlement, the courts of law suppose he meant to make his estates go in the course of common law, *i. e.* that the capital messuage should go to the eldest heir-portioner without recompense; but when a man gives his estate equally, courts of law must suppose that the words are to be understood according to the intention of the donor; *i. e.* that no heir shall have more than another.

PRESIDENT. Suppose that a man has five daughters, and leaves out the youngest in his settlement; or, that he has four daughters, and leaves out the eldest, will a *præcipuum* be due? It is dangerous to step out of the road, and to argue from the analogy of a general rule, which is admitted in itself to be arbitrary. The service is nothing. The distinction is between *hæredes legitimi* and *hæredes destinatione*.

GARDENSTON. Here the will of the man is just the will of the law.

COALSTON. When a man, by a deed *inter vivos*, disposes his estate to two or more persons, the whole will be divided equally among them. In the case of heirs-portioners, practice has introduced an exception. This is necessary; because there are some subjects which cannot be easily divided; some incapable of division. Our ancient lawyers supposed that there was a recompense due when the subject admitted of division; yet it has been otherwise decided in this country, and it is of importance that decisions in an arbitrary matter should be preserved uniform. But I would not extend the decisions by analogy: a dis-

position to four daughters ought not to be viewed in a different light from a disposition to four sons or to four strangers. Here the daughters are not disponees, but substitutes. The counsel for Mr Rocheid incautiously admits that, if James Rocheid, younger, had had daughters, the eldest would have had a right to *præcipuum*. I cannot see this : it seems fatal to the plea on Mr Rocheid's part.

KENNET. The difficulty here arises from the accident of the same persons being both substitutes, and having the right of blood. If Sir James Elder had called his daughters as heirs whatsoever, a recompense would have been due ; but they are called *nominatim*. If James Rocheid, elder, had had afterwards a fifth daughter born to him, she would have been excluded from the succession. This points out a material difference between the right of the four daughters by blood and by destination.

On the 16th February 1773, the Lords found that, in this case, no *præcipuum* is due, as in the case of heirs-portioners *ab intestato* ; reserving to parties to be heard to whom the capital messuage shall be adjudged to belong.

Act. H. Dundas. Alt. A. Lockhart.

Reporter, Coalston.

Diss. Kaimes, Pitfour, Gardenston, Alva, Monboddo. Mr Cathcart reclaimed : his petition was appointed to be answered. He afterwards adjusted matters with Mr Rocheid.

1772. November 17. ALEXANDER, DUKE of GORDON, against JAMES, EARL of FIFE.

SUPERIOR AND VASSAL.

[*Dictionary*, 15,096.]

HAILES. The docquet subjoined to the charter, 1686, is null by the statute 1681. It mentions not the name and designation of the writer : the names and designation of the witnesses are not inserted in the body of the writ : but, independent of this, the docquet seems misunderstood by the pursuer. "Upon the condition above expressed," does not mean that David Stewart was to hold for ever of the lord of erection. *Tenend. in feudifirma et hæreditate in perpetuum*, is a constant clause in feu-farm charters, and means that the superior had alienated to the vassal as in property, and without reversion. This is not a condition by which the vassal agrees to hold. There is no occasion for a man interposing his assent to hold a perpetual property instead of a casual. The only meaning of the condition above expressed must be, that the vassal was willing to perform

the military service, which is here, in a manner somewhat uncommon, inserted in a charter of feu-farm. This did not astrict David Stewart to the lord of erection as his superior, if he could, in any future time, make another bargain with the crown, the natural superior.

[Mr A. Lockhart, whose ignorance in this matter is well known, denied the proposition that *in perpetuum* was a common clause in feu-farm charters. I understand that Mr Archibald Campbell, who has drawn more feu-farm charters than Mr Lockhart can read, acknowledges the observation to be just in style.]

AUCHINLECK. The acceptance is nowise published. This scrap of writing could not cut out a man from resorting to the crown as superior. The consent here is not of the nature of a resignation : which the Act, 1661, requires.

MONBODDO. The cause stands where Lord Auchinleck put it. A bargain with the lord of erection is requisite : here was a consent to take a charter. The consent appears not on record : it is not good against a singular successor : *i. e.* a purchaser ; for Innes was such, as being an adjudger in implement. My only difficulty is, that the vassal possessed for forty years on the charter from the lord of erection, and that a consent is thereby prescribed to hold of the Lord of erection in all time coming.

JUSTICE-CLERK. My difficulty is from the words of the statute, 1661. If the vassal consented to hold of the lord of erection, he renounced the benefit of the statute. Upon this view of the statute I examine the charter and docquet, 1686. The law, from tenderness to the vassal, would not hold the mere taking of a charter as a consent binding on the vassal for ever. The only question is, Whether did David Stewart, with his eyes open, accept of the lord of erection as his superior. In the case of the *Duke of Hamilton*, the Court even admitted of presumptions, in order to prove a consent. I do not see that the law requires any notification to a singular successor. The statute was public law, known to David Stewart ; and his rights showed how his title stood. The singular successor ought to have adverted to this ; but I observe that the docquet is no probative writing, and therefore not good.

KAIMES. The purchaser, before his purchase, might have brought an action against Lord Dunfermline, for having it found and declared that he was to hold of the crown.

COALSTON. The Act, 1661, provides that the vassal shall be cut off from holding of the crown, if he consented to hold of a subject-superior or the lord of erection. The question is, Have we sufficient evidence that David Stewart did so consent ? All depends upon the docquet. That is no stronger than taking infestment, which would not be sufficient.

PRESIDENT. In 1679, David Stewart took a charter and infestment from the crown ; in 1686, from the Lord of erection : 1762, Lord Fife's author, upon a purchase from the heir of Stewart, adjudged in implement, and afterwards took a charter from the crown. The docquet, 1686, can scarcely bear any other sense than that the vassal meant to continue vassal of the lord of erection. But then Lord Fife's author was not bound to know this consent, nor was he thereby bound. It was in the chartulary of the superior, but not in the vassal's charter or infestment. As to Lord Monboddo's difficulty, there are no *termini habiles* for prescription : David Stewart had a feudal right from the crown as

well as from the lord of erection. There was no possession by the lord of erection upon the charter 1686, because he would have drawn the feu-duties independent of that charter, and although David Stewart had continued to hold of the crown.

ALVA. It does not appear, from the docquet, that David Stewart consented to hold for ever of the lord of erection.

On the 17th November 1772, "The Lords assoilyied."

Act. J. Montgomery, &c. Alt. R. M'Queen, &c.

Reporter, Alva. *Non liquet*, Gardenston.

4th March 1773.—JUSTICE-CLERK. I am still of the opinion of the interlocutor. The lords of erection resigned the superiorities, reserving their infeftments as titles to draw feu-duties. There is a proviso in the case of the consent of the vassal. The question is, Whether the vassal has given such consent as is required by statute. I will not hold the act of taking charters as sufficient to imply such consent. It would be dangerous to adopt such an inference. The law made the king superior of church lands as much as of lay lands: the anomalous right left with superiors led people to mistake, and to accept of charters from the subject-superiors. I will never overtake the vassals in this country, when they go to subject-superiors, and accept of charters from them, unless I see the condition fulfilled,—the consent of the vassal. There is no such thing here; nothing but a null docquet. I require evidence in a formal writing, obligatory on the vassal and his heirs.

AUCHINLECK. I have only to add, that the consent in the Act of Parliament does not mean by taking charters, but by a petition from the vassal of the churchlands. There are upon record writings of that nature, particularly in the case of the vassals of the Abbacy of Kilwinning.

MONBODDO. The first question is, Whether the charter to David Stewart, in 1686, binds him and his heirs from returning to the crown? 2d, Whether this charter is binding on singular successors? As to the first, the taking this charter, and the acceptance, was binding on David Stewart and his heirs. The peculiarity here is, that David Stewart did once hold of the crown. After that he agreed to hold of the lord of erection. Consent was here adhibited: the vassal gave up the crown's charter. This consent is not the worse because not executed in a formal way: it is stronger, because done informally and *per saltum*. The docquet is not regular, but the infeftment remedies that. As to the second point, Whether this is binding on singular successors? I think that it is binding, because the singular successors might have seen the right of the subject-superior, both in the seasine and in the retours of David Stewart's heirs. There is much also in the plea of prescription. David Stewart consented to possess upon the posterior right. That was the title of possession. The case of *Heriot's Hospital* was a bad decision, even although it had not been reversed.

COALSTON. My only difficulty is upon the point of prescription. It is necessary that a clear consent be given: equivalents are not to be laid hold of. If the docquet is not binding, by what law can we make it effectual? The acceptance in the docquet is no stronger than an infeftment, which is a consent *rebus et factis*. I do not see how the singular successors can be bound: They did

not see the docquet; and, if they had, they would have only seen that David Stewart agreed to hold of the lord of erection. [In the course of the debate his difficulties as to prescription were removed.]

KAIMES. A man has a choice of two things: if he choose one thing for *ten* years, he may change his mind on the eleventh. My difficulty is, Whether there is a valid obligation on David Stewart? If he was once vassal of the Duke of Gordon, he could do no act or deed to disappoint the vassalage. But I doubt as to the validity of the docquet. It can only be supported as a relative deed.

GARDENSTON. As to the point of prescription; suppose the vassal had formally agreed to hold of the subject-superior, and had afterwards taken a charter from the crown, and had possessed on that charter for forty years—Would not the plea of prescription be good as to the vassal? We cannot make a distinction between the right of the vassal and the right of the superior.

JUSTICE-CLERK. David Stewart once had a charter, (in 1679,) from the crown. In 1686, he took a null charter from the subject-superior. Will you force him to ascribe his possession to a *null*, when he had a good title? There is no evidence that he possessed upon the *null* title. Besides, he died long before the lapse of the years of prescription; and no feudal title has been made up by his heirs upon the footing of the charter 1686.

AUCHINLECK. I doubt of the power of election, after that the king was once chosen for the superior. If a man desires to be entered vassal, he may take a charter from half-a-dozen superiors, and he may ascribe his possession to whichever charter he pleases.

ALVA. A consent must be such as to infer an abjuration of every other superior.

On the 4th March 1773, "The Lords repelled the reasons of reduction, and adhered to their interlocutor of 17th November 1772."

Act. A. Lockhart. *Alt.* R. M'Queen.

Reporter, Alva.

Diss. Gardenston, Monboddo. *Non liquet,* Kaimes.

N.B. The objection to the docquet had escaped the observation of the lawyers, and was accidentally discovered on the bench by Lord Hailes.

1773. January 19. JAMES SCOT *against* JAMES FRASER.

POOR.

Power of heritors sustained to lay on an assessment for maintenance of the poor by the real rent, although formerly levied according to the valued rent, as being an expedient alteration from the particular situation of the parish.

[*Fac. Coll.*, VI. 124; *Dictionary*, 10,577.]

AUCHINLECK. If the rule of real rent, adopted by the heritors and kirk-ses-

sion, be not followed, every thing will be set loose. The valued rent cannot be the rule, and much less the old extent.

PRESIDENT. The Acts of Privy Council are later than the statute on which Fraser pleads; they are *in viridi observantia*, and assessments are laid on according to them. Fraser pleads against his own interest as an heritor; for the purpose of the assessment is to relieve the landed interest by laying a tax on houses, which would otherways pay nothing.

On the 19th January 1773, "The Lords decerned against Fraser, adhering to Lord Monboddo's interlocutor.

Act. A. Murray. Alt. Henry Erskine.

COALSTON. The imposing taxations according to the real rent is a novelty. It has never been used in the cases of ministers' stipends, reparation of manses, &c. Although we were not tied down by any law, I should doubt of the propriety of introducing *real rent* into taxation. The constant fluctuation of real rent makes this inexpedient. That there are inconveniences in making the valued rent the rule, is not enough to overturn this important part of the constitution.

JUSTICE-CLERK. The Acts of King William's Privy Council are part of our law concerning the poor, and indeed the most valuable part of it. The Acts of Privy Council give a sufficient latitude, by the words, *or otherwise*. Were we legislators, there could be no doubt that the valued rent would be an unconscionable rule, burdensome beyond measure on the landed interest. I think it reasonable that some plan should be adopted in order to prevent inequalities.

PRESIDENT. I doubt of the power of the Court to make such regulation. The parties ought to have recourse to the Sheriff: if any inequality remains from his judgment, the Court will give redress. In the case of *Heriot's Hospital*, the Court would not consent to make regulations for the future. There is a latitude in the proclamations: Valued rent is the rule when it can be followed; but sometimes that rule cannot be followed: thus, for example, the heritor has relief from his tenants for one-half. This must be estimated by real rent, for farms are seldom valued separately. Hence, in effect, in common cases, one-half of the taxation will be levied by the valued rent, the other by the real.

KAIMES. When there is a town and a country parish, Lord Coalston's rule is good; but a country parish may, by the accession of building, become a town parish, and then the rule is bad.

On the 5th March 1773, "The Lords decerned in terms of the libel, adhering to their interlocutor of the 19th January 1773; but, of consent, found no expenses due."

Act. A. Murray. Alt. J. M'Laurin, H. Erskine.

Diss. Alva.

1773. *January 23.* JAMES BRUCE of Kinross, *against* ROBERT GREIG and OTHERS.

CLAUSE—PUBLIC BURDEN.

[*Faculty Collection, VI. p. 131 ; Dictionary, 2333.*]

HAILES. If the consequence of the clause in the charters of the defenders is, that they are to be relieved of every burden imposed by law on heritors, very unexpected consequences will ensue. I suppose that, in the shire of Kinross, the ten shillings in the L.100 of valued rent for reparation of bridges, &c., is levied according to the Act 1669. The superior must refund this exaction, levied from the heritors, for 40 years back. This will amount to one-fifth of the valued rent for one year. All impositions for the poor, whether according to value or real rent, must, in like manner, be refunded for 40 years back ; and no one knows to what this may amount. The Crown is deeply concerned here : for example, the feuars of the Earldom of Ross hold their lands for a feu-duty *pro omni alio onere* :—The Crown therefore must build and repair all the churches, manses, schoolmasters' houses, &c. in Ross-shire.

PITFOUR. In the case of *Garden of Troup* and *The York-Buildings Company*, a general lessee, liable in *public burdens*, was found not liable to repair manses. The argument there was, no burdens are public, unless due to the public.

JUSTICE-CLERK. Feuars, here, have only relief of common public burdens : annual burdens are not indeed specially mentioned, but all the burdens mentioned are annual.

KAIMES. The property is subjected to all those burdens, unless in so far as relieved by the grant : Here it is not relieved from the reparation of manses, which is no more than an occasional burden.

GARDENSTON. The exemption is very general : Had the question come recently, I should have supposed the feuars to be exempted. The words are so general, that *Rogue-money*, which the heritors may levy or not, would have been comprehended.

On the 23d January 1773, "The Lords found that the defenders have no relief;" adhering to Lord Kennet's interlocutor.

Act. A. Lockhart. *Alt.* J. M'Laurin.

March 5.—MONBODDO. I should doubt, were it not for the practice. I can hardly make a distinction betwixt minister's stipend and the buildings of churches and manses.

GARDENSTON. All clauses in favour of vassals ought to have a liberal interpretation.

COALSTON. I have the same difficulty. The burden in question seems comprehended under the general words.

KAIMES. The only question is, whether the reparation of churches falls within the general words. From the nature of the contract, the feuar must repair his own house, unless the contrary were stipulated: The church is his own house.

HAILES. Wherever there is any ambiguity in the contract between superior and vassal, usage must explain it. Any other rule would be dangerous.

PITFOUR. Public burden is properly a burden paid to the public: yet still the words ought to be liberally constructed, so as to comprehend every burden generally paid.

AUCHINLECK. *Cujus commodum ejus est incommodum*. If we were to find that the feuars were not to club for upholding the church, what title have they to seats in the church?

PRESIDENT. They are entitled to seats as heritors. The question turns upon the import of the contract. I doubt whether a practice, if erroneous, will form a rule of law. The words are very broad: all the expressions, however varied, seem to tend to this, that the feuars were to pay nothing but feu-duty.

KAIMES. Were the terms clear, I would not open my mouth in defence of the interlocutor; but they are doubtful, and I will explain them from practice.

JUSTICE-CLERK. The parties had not this case in their view. Their only idea was of annual prestations payable to third parties, not of precarious and contingent burdens. I go upon this principle, that the sense and understanding of the parties must be the rule of interpretation.

MONBODDO. The distinction between annual and contingent burdens solves not the difficulty. Anciently, all public burdens were contingent, and may be so hereafter.

On the 5th March 1773, "The Lords found that the vassals were not entitled to relief from their superior;" adhering to their interlocutor of 23d Jan. 1773.

Act. J. M'Laurin. *Alt.* A. Lockhart.

Diss. Coalston, Pitfour, Gardenston, Monboddo, President.

1773. *March* 10. ROBERT JOHNSTON and DONALD SMITH *against* ALEXANDER CHISHOLM and OTHERS.

BANKRUPT—PERSONAL PROTECTION.

[*Faculty Collection*, VI. p. 169; *Dictionary*, 10,473.]

COALSTON. I doubt whether the nomination of trustees takes the matter out of the jurisdiction of the Court, so far as to prevent the Court from giving aid.

PITFOUR. As to the powers of the Court, the giving a protection is for the

benefit of the creditor, not for the conveniency of debtors. I do not see that the statute has made a difference when the estates are vested in trustees.

PRESIDENT. I differ totally from what I have heard : Creditors may give a *supersedere*,—the bankrupt may suspend. There is no word in this statute which gives the Court a power of granting personal protections after trustees are once named. If the creditors incline to have affairs conducted by trustees, every thing returns into the course of the common law.

JUSTICE-CLERK. It shall not be the interpretation of a doubtful clause in the statute, which will make me hold that a personal protection may be granted in opposition to the Act, 5th Geo. III.

On the 10th March 1773, "The Lords found that the Court is not empowered, by Act of Parliament, to grant the personal protection ; and therefore refused the petition.

For the petitioner, A. Lockhart. *Alt.* J. M'Laurin.

1773. June 16. MESSRS ASHTON, HODGSON, and COMPANY, *against* SARAH MACKRILL.

FOREIGN.

Arrestment, *jurisdictionis fundandæ causa*, of effects, in this country, belonging to a Foreigner at the time of his death, used by another Foreigner, his creditor, whereon he brought an action of constitution and payment against the defunct's widow and daughter as his representatives, founds a jurisdiction to this Court to pronounce decree of constitution against the widow, executrix appointed in her husband's will, who, in pursuance thereof, had taken letters of administration, and, though not confirmed according to the Scots form, ~~was~~ maintaining actions against the debtors to the executry in this country, and likewise a party in multiplepointings brought by them.

[*Fac. Coll.*, VI. 171 ; *Dictionary*, 7669 and 4835.]

GARDENSTON. The single question is as to jurisdiction. I do not think the objection solid. The effects of a stranger, debtor in this country, while he is alive, may be affected by arrestment *jurisdictionis fundandæ causa*. The question is, Whether the same form ought not to be observed when the debtor is dead ? I see no reason or authority for making a difference. The executor nominate is *eadem persona cum defuncto*. Sarah Mackrill ~~has~~ appeared in a multiplepointing, whereby she has acknowledged the authority of this Court.

HAILES. Sarah Mackrill, as administratrix, has received powers from the Ecclesiastical Judge to act in that capacity, and has found security. She acts for Messrs Ashton and Company as much as for any other creditor ; and, if there is any dividend due and payable to Messrs Ashton and Company, she must pay it. This action, therefore, is not to obtain a legal right by the law of England : *that* is already secured ; but it tends, by a new form, to invert

the order of English preferences ; and *this*, I think, the Court ought not to encourage.

COALSTON. Approved of Lord Gardenston's principles : The *arrestum jurisdictionis fundandæ causa*, or rather *explicandæ causa*, may be a modern invention ; yet it is founded on this plain principle, " that every Judge must have jurisdiction over every subject in his own territory." It is the situation of the effects which gives a jurisdiction. As, during the life of Mackrill, the effects were subject to this form of diligence, so also must they after his death. Real estates, in Scotland, belonging to Englishmen, may be directly affected by diligence. Suppose the Englishman dies, is it not competent to charge his heir ? It is of no consequence what this question is : we must judge between foreigner and foreigner, as between foreigner and native, or native and native. Besides, Mackrill, by appearing in the multiplepoinding, has acknowledged the jurisdiction of this Court, and must be subject to it.

KAIMES. An Englishman, having an estate in this country, is, in effect, a Scotchman : he is the King's vassal ; so no difficulty as to him, whether dead or alive. Moveable effects are liable to the jurisdiction of this Court : the arrestment is only necessary to fix the goods in the hands of the party. If the proprietor is not subject to the jurisdiction, the arrestment will not subject him ; but still the goods are subject.

PRESIDENT. I doubt whether arrestment, by an Englishman, of goods belonging to an Englishman, is competent at all. I doubt whether this would be good although Mackrill was still alive. After Mackrill's death, the Englishman cannot take them out of the *hæreditas jacens* by any form hitherto known in law.

JUSTICE-CLERK. The jurisdiction does not arise from the *arrestum* but from the situation of the goods. This case is singular. Here the goods, strictly speaking, have no proprietor at all : they are *in hæreditate jacente* : but still they are not *res nullius*, and the Court may have a jurisdiction to make the goods recoverable. I think that the jurisdiction can take place in so far as to allow the creditor of Mackrill to constitute his debt. This *arrestum* is introduced for doing justice : if it is used in order to disappoint the course of payment, according to the foreigner's own law, I should greatly hesitate.

ELLIOCK. I have no doubt of the competency of the arrestment, : the Justice-Clerk's objection is premature.

MONBODDO. The widow cannot repudiate the jurisdiction of the Court, from the necessity of the thing.

KENNET. Ashton and Company could not confirm, because their debt was not constituted. Their arrestment is in order to constitute.

On the 16th June 1773, " The Lords repelled the objection to the jurisdiction over the widow."

Act. J. M'Laurin. Alt. A. Wight. Reporter, Monboddo.
No vote, but President, Hailes, &c. against the judgment.

1773. June 22. JOHN SCOTT and OTHERS *against* JOHN WILSON.

PARENT AND CHILD—IMPLIED POWER.

The nomination of a trustee in a deed executed by a man and his wife for behoof of their Children, is revocable by the father, as their administrator-in-law, though the deed should contain no express power of revocation.

[*Fac. Coll.*, VI. 175 ; *Dictionary*, 6585.]

GARDENSTON. The father did not mean to divest himself of the power of administration. This naming tutors and curators can only be in the event of himself dying.

AUCHINLECK. The father has power to revoke the whole.

HAILES. According to Wilson's argument, his powers are such that he may send one of the children to sea, although the father should propose to give him an academical education.

COALSTON. Two things are confounded by Wilson, which in themselves are distinct. The deed, *quoad* the children, is irrevocable ; but the father and mother may alter the trustee. The children, who are minors, may uplift with consent of their administrators.

MONBODDO. A father cannot assign away his paternal power, or renounce his rights of administration. This is not the case here ; it respects a particular sum. If the father can name a new trustee, he can uplift the money and take the administration upon himself.

On the 22d June 1773, "The Lords found the letters orderly proceeded ;" altering Lord Monboddo's interlocutor.

Act. R. M'Queen. *Alt.* A. Lockhart.

1773. June 23. JOHN ARBUTHNOT *against* ANN ARBUTHNOT.

HEIR AND EXECUTOR.

It is the nature of the obligation granted for the price of lands purchased at a Judicial Sale, and not of the debts ranked thereon, that regulates the relief *quoad* these debts, between the Purchasers, Heir, and Executor.

[*Faculty Collection*, VI. 180 ; *Dictionary*, 5225.]

AUCHINLECK. The debt appears to have been moveable *quoad debitorem*, and therefore the interlocutor is right.

KAIMES. James Arbuthnot purchased an estate. The price was not paid

up during his life. The heir takes the estate. The executor must pay up the price.

GARDENSTON. This is the same case as if I should buy an estate by a private bargain or a voluntary sale. If I have not paid up all the price during my life, it must be made up by my executor.

PITFOUR. The hardship mentioned by Mrs Ann Arbuthnot, (at the end of her petition,) occurs every day. It particularly occurred, not many years ago, in the case of *The Children of M'Kenzie of Kilcowie*.

PRESIDENT. The bond is personal altogether, though granted for extinguishing of heritable debts.

On the 23d June 1773, "The Lords repelled the defences, and found Mrs Ann Arbuthnot liable *secundum vires inventarii*.

Act. R. M'Queen. *Alt.* A. Lockhart.

1773. June 24. COLONEL CHARLES CAMPBELL of Barbreck *against* JAMES M'NEIL and JAMES M'CONOCHY.

FREEHOLDERS.

Equivalent to a refusal to enrol, where the only two Freeholders who attended a Michaelmas meeting evaded taking cognisance of a claim for enrolment which was duly lodged, and moved to them by the clerk, on the pretence that neither the claimant, nor any person for him, appeared to support his claim; and that a motion made to them by another Freeholder, while they were in the court-room, to take the claim under consideration, was too late.

[*Dictionary*, 8849.]

AUCHINLECK. I never saw so gross a thing done by any persons pretending to the name of gentlemen.

HAILES. It would be a very convenient doctrine, for any set of freeholders who are all of a side, were they permitted to hear, in silence, any claim made, without either granting or refusing, and then to plead that they did not *refuse* to enrol; and, therefore, that the law gives no remedy. This neither is nor can be the sense of the statute. It is a *denegatio justitiæ*, and a ground of advocacy, if a Sheriff permits a process to lie before him unadvised, although he does not refuse to give judgment.

On the 24th June 1773, "The Lords found that the freeholders had done wrong in not enrolling Colonel Campbell; and therefore ordained him to be enrolled, and found expenses due."

Act. Ilay Campbell. *Alt.* W. Campbell.

1773. June 26. JEAN MONTIER *against* MARGARET BAILLIE.

TERCE.

[*Dictionary*, 15,859.]

COALSTON. No debts can affect the terce which are not heritably secured and affect singular successors. Here three things are necessary: 1st, That the obligation be special as to the creditor; 2d, Special as to the sum; 3d, Ingrossed in the infeftment. The first and second requisites occur in this case; the third is wanting.

JUSTICE-CLERK. When the father reserved a liferent, and a power to burden the lands with a certain sum, this could give him no greater rights than the son would have had upon the fee being transmitted to him without any burden whatever. Had the fee been without burden, the son could not have charged the lands against the tercer by a simple bond, without infeftment: therefore the father could not execute the faculty against the tercer but by infeftment.

AUCHINLECK. In this case the reserved faculty only put the father in the same situation as if he had not disposed the estate: How can his personal creditor compete with the tercer, who is an onerous creditor, and, by a fiction of law, a creditor infeft?

KENNET. The sums first paid can never be a real burden, for they were paid without any reference to the faculty. The only question, then, would be as to the remaining L.50, which is settled with a reference to the faculty. But here the reasoning of the Justice-Clerk is solid.

On the 26th June 1773, "The Lords found that the debt due to Margaret Baillie is not a burden upon the terce."

Act. Ch. Hay. Al. R. M'Queen. Reporter, Stonefield.

1773. June 29. ROBERT MAXWELL of Glenarm *against* WILLIAM BURGESS.

PROOF—TACK.

[*Faculty Collection*, VI. 134; *Dictionary*, 12,351.]

COALSTON. The proof allowed by the Ordinary was as to the condition of the houses. It is material to have the facts cleared up, both as to the time of building the dwelling-house and building the dikes. As to the clause in controversy, if taken by itself, it does not imply an obligation to build new dikes or houses; yet we ought to examine what followed upon it; as tending to explain the meaning of the parties.

ALEMORE. Tenants must take houses as they are, unless there is an express stipulation to the contrary. Any other rule would be dangerous.

ALVA. How can a corn-farm be possessed without a byre and a stable? The tenant is only bound to repair: therefore, all houses necessary must pre-exist.

KAIMES. The master is not bound to any *novum opus*.

KENNET. The circumstances of the case ought to be taken under consideration.

On the 29th June 1773, "The Lords found that the master was not bound, by the clause in the tack, to build any new houses;" altering, in effect, Lord Alva's interlocutor.

Act. A. Crosbie. *Alt.* G. Clerk, Ilay Campbell.

Diss. Pitfour, Alva, Kennet. [Hailes did not vote, because he desired to see a proof of facts, and inclined not to pronounce upon the meaning of a clause in the abstract.]

1773. June 29. MR WILLIAM WALLACE, Minister at Drummelzier, *against* WILLIAM, EARL OF MARCH and RUGLEN.

STIPEND.

Construction of the Act 1690, c. 23.

[*Faculty Collection*, VI. p. 190; *Dictionary*, 14,812.]

MONBODDO. The Act 1690 gives nothing to ministers at all. There is an exception if the minister is in possession of feu-duties; but the minister here has a modified stipend, and the feu-duties are no part of that stipend. After the modification, the minister has no possession of the feu-duties: every thing beyond that modification is in the possession of the patron.

GARDENSTON. The noble lord plays for a small stake. I do not think that he should win it. There is an exception in the statute when feu-duties are part of the minister's stipend, or where the minister is in possession of them. How then can the patron claim?

PITFOUR. It matters not whether the stake be great or small. As far as the exception reaches, it is the same thing as if the Act 1690 had never been made.

ALVA. The minister's title still continues as it was before the modification.

AUCHINLECK. I thought, on examining this case, that the feu-duties were due to the minister, and that the argument from the Act of Parliament did not conclude. There is an exception where there is either modification or possession by the minister. In either case the patron has no right. The Act of Parliament has equiparated ten years' possession to a decret of modification.

COALSTON. As to services, I was misled by the Act 1683, but which I now observe relates to lords of erection, not to beneficed persons.

HAILES. The services are not prestable by the vassal in person ; so are not personal. They are determined, not according to use and wont, so are not general. It follows that they are not taken away either by the statute of Geo. I. or by Geo. II. The minister here is defending the rights of his benefice ; his own interest will not equal his expenses ; therefore Lord March ought to pay costs.

On the 29th June 1773, the Lords repelled the defences, and found expenses due.

10th August 1773, adhered.

Act. G. Ogilvie. *Alt.* Ilay Campbell.

Reporter, Coalston.

1773. July 1. SIR JAMES COLQUHOUN *against* JAMES HAMILTON.

MEMBER OF PARLIAMENT.

[*Fac. Col.* VI. 194 ; *Dict.* 8743.]

HAILES. This seems the worst of all good votes.

KENNET. I think this is not a good vote. Here is not a wadset, for there is no *sors*.

PITFOUR. Wherever there is a wadset or pledge, there must be a debt. There cannot be an *accessorium* without a *principale*.

GARDENSTON. There are many easy ways of making votes ; but this will not answer.

AUCHINLECK. We may safely say that this is not an usurious wadset.

On the 1st July 1773, the Lords altered their former interlocutor, and found Hamilton wrongfully enrolled, and therefore ordered him to be expunged.

Act. A. Lockhart. *Alt.* Ilay Campbell.

1773. July 8. JAMES NEIL *against* JOHN BROWN.

ARRESTMENT.

[*Faculty Collection*, VI. 155 ; *Dictionary*, App. I. Arrest. No. 3.]

PITFOUR. The practice of that sort of diligence called *filius ante patrem*, may be reasonable in maritime causes, but it is not in mercantile. The practice is erroneous, a slovenly imitation of what has been done in maritime causes ; and cannot be supported.

PRESIDENT. I do not so much as see a practice proved. I will not receive the evidence of the Judge-Admiral and of his procurators, to prove a practice which will destroy the officers of other Courts.

JUSTICE-CLERK. There are no examples of this practice, but a very few within these five or six years, and these, too, litigated; which shows the thing to have been a novelty. The diligence itself is anomalous. I cannot conceive any practice more hurtful to commerce and the credit of merchants, than one which may lock up their effects to any extent at the instance of they not who. If I saw a fixed practice, I would suppose that the nation was wiser than I, and had acquiesced in it; but I see nothing of this kind.

On the 8th July 1773, the Lords, in respect that Brown's arrestment was not in a maritime cause, and was executed before creating a dependance by citation of the common debtor, preferred Neil's, which was regularly executed; adhering to their own interlocutor of the 26th February 1773, and to Lord Stonefield's interlocutor.

Act. R. Cullen. *Alt.* J. M'Laurin.

1773. July 14. ALEXANDER GORDON of Whiteby *against* GENERAL JAMES ABERCROMBIE and OTHERS.

MEMBER OF PARLIAMENT.

Competency of producing new evidence in the Court of Session, to support a claimant's title.

[*Faculty Collection*, VI. 165 ; *Dictionary*, 8876.]

HAILES. My difficulty as to the receiving of new evidence is upon the judgment in the case of Captain Stewart, respecting the Laird of Wevay's lands. There the Court was much moved by a judgment of the House of Peers in the case Sir John Gordon; and it was said that that judgment showed the enix will of the House of Peers, that the evidence should originate before the court of freeholders, and that new arguments might be produced before the court of review, but not new evidence.

AUCHINLECK. All that is incumbent on a claimant is to produce charter, sasine, valuation, or evidence of old extent. If any objection is made, he may support his claim by a reply, and then produce evidence, which only the objection made necessary.

MONBODDO. Evidence in support of evidence, before the freeholders, may be produced.

ALEMORE. In matters of this kind, a distinction is to be made. If the claimant produce valuation, &c., he complies with the Act; but, if there is any ambiguity, he ought to come prepared to clear up the ambiguity, because he might have foreseen the objection thence arising.

[This rule seems a good one ; but I should think that, in the present case, it goes to the inadmissibility of the new evidence, for the ambiguity in the titles produced was obvious.]

PRESIDENT. I had once formed to myself a system of political law, but it has been shaken partly by the judgments of this Court, partly by the judgments of the House of Peers. I still wish to recur to my old system. I think that the doctrine of the reclaiming petition would destroy the whole spirit of the law. We are not to judge *prima instantia*. Grounds of claim must be produced before the freeholders ; but still opportunity must be given to answer objections, especially as absent freeholders may object. I also doubt of the competency, after decret had gone out, upon the proof before answer being allowed.

On the 14th July 1773, the Lords found the production of new evidence competent.

Act. Ilay Campbell, &c. *Alt.* Cosmo Gordon, &c.

1773. July 16. ROBERT ARTHUR *against* JOHN CALLIN.

ARBITRATION.

Reduction of a Decree-Arbitral.

[*Faculty Collection*, VI. 205 ; *Dict.* 667.]

HAILES. The proof is competent. Arthur's objection to the decret-arbitral is, that the arbiters have left a point to be decided by an after probation. Callin answers, The arbiters did this at Arthur's special request, and this fact will be proved by the oaths of the arbiters. Arthur cannot be allowed to object to his own deed : he is barred *personali exceptione*. The purpose of the proof is singly to make good the *personalis exceptio*.

PRESIDENT. I will neither support nor overturn a decret-arbitral by the evidence of witnesses ; but I will allow a fact to be proved concerning a decret-arbitral, in order to explain the *res gesta*.

On the 16th July 1773, the Lords found that the arbiters may be examined ; adhering to the interlocutors of Lord Auchinleck.

Act. A. Lockhart. *Alt.* R. M'Queen.

1773. July 16. AGNES WATSON *against* MARY RAE.

TUTOR AND CURATOR.

[*Fac. Coll.*, VI. 207 ; *Dictionary*, 16,369.]

HAILES. There is no contrariety in the decision of *Little Libberton*, as re-

ported by Forbes and Fountainhall ; only the one account of it is more special than the other.

KENNET. The curators cannot be excused as to omissions, for they neglected to make up inventories.

PRESIDENT. An express statute was necessary, in order to authorise the father to dispense as to omissions. We cannot extend the statute : if we could, we ought not ; for then every curator would insist to be named without being liable for omissions. If this is the common practice, so much the worse. A judgment of the Court is the more necessary, to correct abuses.

On the 16th July 1778, the Lords found the curators liable for omissions ; adhering to the interlocutor of Lord Auchinleck.

1773. *July 20.* ROBERT GORDON of Hallhead *against* JAMES BRODIE and OTHERS.

SASINE.

[*Supplement, No. 5,587.*]

MONBODDO. It was not necessary for the notary to be more special than he has been.

COALSTON. It would be much better for notaries to follow the common style. Yet I dare not listen to an objection which might overturn many a real right. At least, I would make a previous inquiry into the practice.

On the 20th July 1778, " the Lords repelled the objection, and ordered Mr Gordon to be enrolled."

Act. A. Gordon, Cosmo Gordon. *Alt.* J. Ferguson, &c.

1773. *July 27.* JOHN HINTON, Bookseller in London, *against* ALEXANDER DONALDSON and OTHERS.

LITERARY PROPERTY.

[*Woodhouselee's Dictionary, III. 388 ; Dictionary, 8307.*]

KENNET. I meddle not with the law of England. I am not acquainted with that law, nor do I think that the question can be determined by that law. The question is as to the law of Scotland. The claim is not founded on the law of nature. That law is not founded on abstract reasoning ; it must be

something that immediately corresponds with our feelings. Nor on the law of nations. There, *consensus gentium* is required. There are no traces of it in our law ; neither *responsa prudentum*, nor practice, nor *series rerum similiter judicatarum*, nor statute. The statute 8vo *Annæ* takes not any right away. On the contrary, the rubric, the act of the legislature, looks as if there were no right to take away.

AUCHINLECK. The question is interesting,—what never received judgment but once in England, and that very lately, and there too the judges differed. *Nil tam absurdum quod non dicendo fit probabilis*. The judges in England were bewildered in the multiplicity of arguments. [Lord Auchinleck told me that he had read the report of Burrows ; that he understood Judge Yate's argument, but not the others. Now, said he, when I meet with a thing that I do not understand, I conclude it to be nonsense.] The question itself is not difficult. That an author has a right to his conceptions while in his head or in his cabinet, is certain, but the question is as to the property of a performance after publication. The bar jumped from *ideas* to the *written book*. I took an intermediate step,—the words. Has a man a right to the property of a *bon mot* as long as he lives, and his heirs after him? *Nescit vox missa reverti*. If once a man speaks out a sentiment, he communicates it to his hearers, and it is theirs for ever. Homer's works were preserved by memory for many ages ; so were the works of Ossian ; so was Chevy Chase : was there any copy-right in it? I am old enough to remember when sermons were delivered *extempore*, without notes or premeditation. It would have been ill taken if a man had not trusted in Providence for his sermon. What sort of a property had a man in a sermon which he could not have repeated? Printing is a wider publication than speaking. Much has been said as to the *English injunctions*. I neither know what they are, nor do I desire to know ; for we have no concern with the law of England. Many privileges have been granted since the invention of printing ; none before. This shows that there was no idea of a right in authors after publication. There is no restriction at this day from taking copies in writing. The right claimed by the bookseller is a jumble of common-law rights, with ordinances and statutes. Prerogative copies are from the sovereign's superintendency in religion and the education of youth ; not from any notion of property. In 1567, a license was granted by the Scottish government to Robert Leprevick for printing various books during 20 years, under pain of escheat of the books. This right was not a right of property, but of political superintendency. It was granted not to an author, but to a printer.

HAILES. I am of opinion that, in England, an author may have a common-law right in his works even after publication. So the English lawyers have said : so it has been determined in the Court of King's Bench. English law, as to us, is foreign law. Foreign law is matter of fact ; and of the fact, I ask no better evidence, for I can have no better evidence than the opinion of lawyers and judges in that foreign country. Whether this right is a property or an interest, or something distinguishable from either, is of no moment. If we are once satisfied of the existence of a legal right, every inquiry into the mode of its existence is superfluous. The London booksellers have put strange interpretations on this common-law right. The Bishop of Gloucester, in his admirable charge to his clergy, has bestowed the appellation of the sages in St Paul's Church-yard

on the London booksellers. The doctrine of these sages is exceedingly commodious: they limit or enlarge this common-law right as best suits their own conveniency. 1. They limit it when maintaining that an author has a right to the whole of his work: they take the liberty of using any part of it that may serve as a proper ingredient for their monthly hachis of literature, their universal magazines of knowledge and pleasure, (published by Hinton.) If the work chances to be short, they retail it in a newspaper, under the appellation of a criticism or an extract. 2. They limit this common-law right by exciting their dependants to make abridgments of valuable works. Herein Stackhouse, the author of the day, was an adept: he published an abridgment of the discourses pronounced at Mr Boyle's lecture. He and this bookseller would have condemned Donaldson and his associates for encroaching on the property of Bentley and Gastrel, yet he scrupled not to abridge the argument of Bentley and Gastrel in defence of religion; nor did his bookseller scruple to print and publish the abridgment. How much of the original arguments evaporated in this literary process, I pretend not to say. Perhaps an abridgment acquires a right by a sort of specification, according to the trite saying—*Male dum recitas, incipit esse tuus*. 3. They limit this common-law right by their dictionaries of arts and sciences. A hundred authors are ransacked, and from them is composed what the sages of St Paul's Church-yard term *an entire new work*. Postlethwait common-placed the authors who had written of trade and commerce. He says, under the article books, "It would be hard that I should be deprived of my twenty years' labour by a literary pirate." That is, it would be hard if any one should steal from me what I have been for twenty years stealing from other people. The London booksellers see no harm in the thefts of Postlethwait, while they remain proprietors of his dictionary. 4. They limit this common-law right even in prerogative copies. They dare not print the text of the Bible by itself; that belongs to the Sovereign: but they print it with notes borrowed from Geneva sometimes, but more frequently from Poland. [This alludes to Goodby's Socinian Bible.]

Again, they enlarge this common-law right in various ways. It seems admitted that there is no property in the work of an author who is absolutely unknown. If ever there was an anonymous author, it is the author of the practical treatise entitled *the Whole Duty of Man*: At this day the sex of the author is problematical. And yet the London booksellers have contrived to appropriate to themselves a work, wherein the pious author pretended no property. Dr Hammond, in his commendatory epistle, says, that the author had thrown the work into the Corban, or public treasury. The London booksellers have taken it out of the Corban. Dr Hammond, in his commendatory epistle, had said that the manuscript was in the possession of Garthwait, the publisher, before publication. Hence the London booksellers have concluded that the property of the *Whole Duty of Man* was in the heirs or assigns of Garthwait. This, by the way, shows that injunctions have sometimes been granted without an accurate inquiry into the merits of the case. On this momentous circumstance, that a publisher was possessed of the manuscript which he published, is founded the injunction 1735. The London booksellers enlarge this property, by bestowing the appellation of *original author* on every tasteless compiler. Hereof the author of the day affords an opposite example. He was as very a compiler as ever descended from a bookseller's garret. The incorporeal substance of Stackhouse's ideas is a non-

entity. And yet, in the opinion of the trade, he is no less an original author than Hooker or Warburton. Here lies my first difficulty. Were we to copy the judgment of the King's Bench in the case of *Miller* against *Taylor*; were we to find that the common-law right of authors in England could be made effectual in Scotland; were we even to find that literary property was established in the law of nature and nations,—still we could not pronounce for the pursuer, unless we were to find that Stackhouse is an original author: That I never can do. But I have a farther difficulty in this case. It is material to inquire how the law of Scotland stood before the statute of Queen Anne? These are the words of an eminent person on a similar occasion. This inquiry was not material, had he understood literary property to be grounded on the law of nature and nations. That law varies not in different countries, according to the elegant passage which we heard from the bar: it is not *aliud Romæ, aliud Athenis*. Neither was the inquiry material, if the common-law right could have had effect in a foreign country. The inquiry which that great man thought material has been made. Of this right there is not a vestige in the law of Scotland. From Lord Stair down to Forbes, all our authors are silent concerning it. From Lord Stair down to Forbes, all our authors have acted as if there had been no such right.

It is said that the privilege which Lord Stair obtained, prohibiting others from printing his work, did indeed confer nothing upon him; but that his remedy lay by an ordinary action at law. It is strange that he should have sought a privilege which gave him no right, and yet should never have mentioned the right which he had. It is vain to say that our authors lived under the despotic sway of a Scottish privy-council. The Scottish privy-council was not despotic after the Revolution. It was a legal court, and legally administered. It was indeed abolished at the Union of the two kingdoms; not because it was despotic, but because it could no longer exist. For the same reason, and at the same time, the English privy-council was abolished. Lord Stair published his corrected work after the Revolution. Forbes wrote in the days of Queen Anne; Lord Bankton in the days of Geo. II. I dare not pronounce that to be a right in the law of Scotland, which has escaped the observation of all our statutes, lawyers, and authors.

MONBODDO. This is a cause of greater property than any that ever came before the court. The first question is, Whether an author has a right to his work after publication. The second question, Whether this is taken away by the statute 8th Anne? The preliminary question, Whether an author can have a right? If the statute has given a right for a limited time, the common law may give a property to perpetuity. This property is an incorporeal right: it consists in the faculty of enjoying the subject without molestation. The property of a purchaser of a book is that of reading and using: the property of an author is that of multiplying the copies by reprinting. An author has a right to the MS.; if he gives copies of the MS. this will not entitle the person receiving to multiply copies. It was so found in the case of Lord Clarendon's MS.: if Lord Clarendon had sold the MS. the purchaser could not have taken it to the press and printed it: the presumption in law is, that it was intended to remain in MS. If an author prints and distributes copies *gratis*, it may not be printed by another. If an author has a right to print once, he has a right to print again. The purchaser has only a right to dispose of the individual copy as he pleases. The

sense of this contract of emption-vendition goes no farther. The title-page of books bears printed *for* the author, or for a bookseller. This is asserting a property in the book. A book without such notification may be understood to be given to the public. It has been found that the author of a private letter had right to every thing but the paper and ink. No man has a property in *ideas*, but he has a property in words, which no man can take from him by a mechanical operation, without having any idea of the subject or even of the language. This is the difference between a book and an engine: a man cannot make an engine without having an idea of the mechanism of that engine. This is the difference between a plagiarist and a printer. The plagiarist steals the thoughts, the printer only the words. If a man could get a book by heart, without understanding it, and repeat it to a printer, there would be no injustice. [There the injustice would lie in the reader, who, as is the case of some readers, had an idea of the subject.] The law of Scotland stands upon the same footing as the law of every other country, upon a *naturalis ratio*. The practice of taking patents is no objection. That was owing to a right of licensing claimed by the Crown. That claim being at an end, the patent is nothing but securing a statutory or common-law right. As to the second question, If there was a common-law right, it was not taken away by the statute, 8th Anne. The argument from the preamble is most unsatisfactory. It is answered by the statute vesting the estates of certain traitors in the Crown. The Crown had an antecedent right: the preamble supposes a right in the author. The body of the statute is clear. As to the inconveniences arising from this literary property, it is not our business, but that of the Legislature, to remedy them. There are great inconveniences from the contrary doctrine. The merit of a book may not be known for more than the term prescribed in the statute 8th Anne. A longer term had elapsed before Lord Sommers informed the English that they had in their language the noblest of modern heroic poems.

JUSTICE-CLERK. The pursuer seeks no benefit from the statute of Queen Anne, or from patent: his claim is at common law. Suppose an action of damages, at the instance of one Scotsman against another, for a book published 40 years ago; this right falls under none of the ideas or principles in the common law of this country: there is no trace of it, *nec nota nec vestigium*. In the writings of the Roman lawyers, though the subject-matter then existed in the ancient world, every man might buy a copy, and employ an hundred slaves in transcribing an hundred copies of it. I see no idea of such a right on the Continent. An author has right to his manuscript: when once published, I see nothing in the common law which limits the right of property in the purchaser. Natural justice, and moral right, are not always the foundation of civil claims: for example, a man lays out his whole fortune in erecting and furnishing a public inn: another man erects an inn just opposite from pique, and with the view to hurt his neighbour: in conscience he is self-condemned, and yet the law of the land gives no aid. There is nothing here but a *jus imperfectum*. After a man has once given his copy to the public, there is no principle in the common law which can limit the use of that copy. It is said that the purchaser of a book is under a tacit condition: this seems a *petitio principii*. I admit that there is good reason to give a right of property to authors, larger or smaller, as the Legislature thinks fit. Literary property is said to be a thing fit and expedient: this may be an argument with the Legislature; to me, a

judge of the common-law, all arguments from expediency are nothing. After ransacking the writings of all our lawyers, nothing concerning literary property can be there discovered. The law of Scotland will sustain action for every species of property founded in the law of England, provided that it is a right acknowledged in the law of Scotland, and not opposed by the rights of individuals. Thus, a patent may be granted in England for the invention of a machine: This is a good common-law right in England, and yet good for nothing in Scotland, because it would impinge upon the right of individuals. The same is the case as to the assignees under a commission of bankruptcy. The subjects of the bankrupt are vested in them; yet, in Scotland, their preference must depend not on their right, but on their diligence. I see, demonstratively, from the argument in the King's Bench, that, if the question had occurred there, immediately after the invention of printing, the judges would have given the same judgment that I have given.

KAIMES. We must judge of this question by the law of Scotland. All damages arise from breach of covenant or breach of property. If I write a book, the manuscript is mine; if any one steals the manuscript from me, I have a *rei vindicatio*: If I die, the manuscript belongs to my heir. If my manuscript is purchased at an auction, for instance, he who purchases it, becomes the proprietor; he may destroy it, give manuscript copies of it, or print it. If I have a privilege as an author of a book, I have the same as an inventor of a machine, as designer of a picture, &c. If I invented the art of gilding my ball, must no man gild his? Faust invented printing: had he a right by the law of nature to the art of printing? Why has man an imitative nature, if he may not be allowed to imitate? Such privilege is inconsistent with property. [After having spoke much upon general topics of conveniency and inconveniency, which are foreign to the office of a judge of positive law.] I think that the statute, 8th Anne, supposed that there was no common-law right in authors.

GARDENSTON. The sources of our common law are: *First*, Usages and established consuetude; *Second*, Feudal law; *Third*, Civil law, in so far as received with us; *Fourth*, Every apparent principle of justice which has been received by the other civilized nations of Europe. *1st*, As to usage, it is directly contrary to the claim of literary property: All our lawyers, themselves, demanded no protection but from temporary patents; *2d*, The feudal law can give us no light; *3d*, It is not so much as introduced into the language of the civil law, although the civil contains an infinity of cases of property and servitude; *4th*, It is no principle acknowledged by civilized nations: they have uniformly gone into the idea, that an author has no more than an equitable claim to a temporary protection in the publishing his works. A man, it is said, has a property in a manuscript, why should he lose it by publishing? This argument is not sufficient to overturn the practice of nations. After publication, every thing is at large. I never could find out a difference between the inventor of a machine and of a book. I never could see a solid metaphysical distinction. Both have a property, before publication. There is no reason to suppose that, by publication, the one meant to sell his art more than the other. It is said that a printer has no ideas, but that the maker of a machine has. I cannot see that. Both are dull mechanics, neither capable of writing a book or of inventing a machine. I cannot distinguish this case from that of engra-

vers. Hogarth is as much an author as Swift or Butler, and I have read his prints with as much pleasure as their works. I cannot reconcile this new property to our ideas of ancient property. There must be, first, a property in nonsense,—that will be a large one; then a property in bawdry, blasphemy, and seditious libels. Mr Wilkes will have the property of the *Essay on Woman* and No. 45. Many books are nothing more than transcripts of former ones. As well might a man pretend to the property of a piece of cloth by dyeing it. Then we have translations, and what Mr Bayes calls transposings and transversings. How is such property to be transmitted from the dead to the living? Executors may be numerous: their title cannot be made complete without a joint consent. Therefore, any one executor of a hundred may put a negative upon the sale of the works of the deceased. I do not suppose that injunctions prove any thing: they are no more than interpositions in equity, in order to give a temporary protection. The statute, 8th Anne, has left the matter just where it was.

COALSTON. This question is of little moment either to learning or authors; for the difference between twenty-eight years and a perpetuity will make little difference in the value of copies: but it is of great moment to booksellers and to the public. My reasons for giving judgment against the pursuer are the same with those of my brethren. This is said to be a right of common law, and yet it is not admitted into any country but England, nor even there till lately. I cannot restrain a man from using a book which he has bought, nor can I distinguish between printing and engraving. If this is a common-law right, I cannot distinguish between the case of natives and foreigners. If action lies for a MS. stolen, as has been found upon the supposition of a common law right, the same must lie for publishing the works of foreigners. I do not think that the statute *8vo Annae* is strong enough to take away a common-law right. Yet I am convinced that the legislature had no view to such a right. The expression, *no longer*, is well calculated to cut off the plea of the stationers: it is not used in the Act concerning engravers, who had not made any claim of right in times past. There is also a specialty in this case. The publication was not clandestine: the book was published at different times. This might imply an abandon of the right, if there was any.

ALVA. All the difficulty here has arisen from language invented by the London stationers. There is no property here, but merely a benefit or an interest; for rendering of which effectual, the intervention of society is necessary. It is a privilege or monopoly depending on the state. It is a negative right from others being prohibited.

PRESIDENT. The question is to be divested of the statute, and of all ideas of conveniency and inconveniency. The question is as to the property of authors. It is strange that a property should have existed so long without being known. Is it possible to say that, because another has genius and invention, he has a property in his works, more than the inventor of a machine would have, which is also the effect of genius. A book is written, proposing a method of raising supplies; the Parliament adopts it: has the author any claim against Parliament, or even any claim for a gratification? The case of engraving is strong and apposite. If there was a property, how could the legislature look on and see it violated, as in the case of books printed abroad? The legislature

has, in effect, declared that this literary property could be invaded with impunity by the importation of books from abroad? This was not prohibited till the statute 12th Geo. II. This is inconsistent with the idea of a common-law property. The statute of Geo. II. does not so much as insinuate that there was any such right. Its preamble proceeds upon the defrauding of the customs, not upon the preservation of the property of authors. It was made temporary; which shows that it was not understood to be a statute in support of common law. If a property is in an author, the legislature cannot take it from him; and yet the statute, 12th Geo. II. allows tracts, printed abroad, to be brought over, if bound up with others. Translations are inconsistent with the idea of property in the original work. Property does not depend upon specialties, and yet the argument in the King's Bench is founded on ten or a dozen specialties: hence I infer that this is not a property, in the common understanding of that word. Mention is made in the case on which that judgment proceeded, of copies necessary for sale having been provided by the plaintiff. How comes that to be material in a question as to property? [This is an acute argument, which the President just hinted at. If an author has a property in a work published, why should he be obliged to furnish a greater number of copies for the impatience of the public than he judges consistent with his own advantage. If the book is his, and if any copy which he sells cannot be multiplied, what right has the public to limit him as to the exercise of his property? No individual has a right to more than the reading of the copy which he purchased, at the rate which the proprietor chose to put upon it. All individuals can have no greater intrinsic right than each; and therefore the inquiry ought not to be whether there are copies sufficient to supply the public, but whether the public has any right to desire to be supplied? If I print an impression of 300 copies, I mean to let 300 persons share in the emolument of learning accruing from my labours. If I print no more than 50 copies, I limit my readers. If I have a property in what is published, why should I be obliged to diffuse my ideas further than I choose. To require evidence that there are copies enough to supply the public, is to suppose that the public may insist for a reading of my work. This is asserting a right in the public inconsistent with the idea of a common-law right in the author. The argument escaped the observation of the bar, and yet it is a forcible argument, and deserves to be treated of at large.] The expression, *printed for the author*, means that the author employed the printer to print that edition, and it means no more. If an author has a right, it may be confirmed, or it may be attached. This right of property can neither be confirmed nor attached. When a man communicates his ideas to the public, he confers an obligation of gratitude on the public, but he has no action against the public for satisfying this obligation of gratitude. The ordinances in England relate merely to the interest of the stationers. The original draught of the Act of Q. Anne had *securing*, but this was altered in the committee to *vesting*. I am persuaded that the words, *no longer*, were purposely inserted in order to prevent any argument from the word *vesting*. An argument has been drawn from the word *vesting* in the statute 20th Geo. II.; but it is erroneous. The forfeited estates could not be vested in the king without an inquest, attended with a thousand intricacies. The statute went upon liberal Revolution principles, for

speedy payment of the debts of the person forfeiting. It was devised for the special purpose of avoiding those intricacies. The Act 8vo *Annæ* is absurd if a prior common-law right had been established. The additional clause for 14 years more, if he is still alive, has never received an answer.

On the 27th July 1773, the Lords sustained the defences, and assoilyied.

Act. A. M'Connochie, A. Murray, D. Rae. *Alt.* J. Boswell, Ilay Campbell, J. M'Laurin.

Diss. Monboddo.

1773. August 4. DUKE of QUEENSBERRY against VISCOUNT of STORMONT.

SALMON-FISHING.

[*Faculty Collection*, VI. 215 ; *Dictionary*, 14,251.]

ALVA. Nothing in the *tenendas* clause can enlarge the dispositive clause.

MONBODDO. Even in charters from the Crown, were it not that the *tenendas* clause is not revised by the Barons, a grant of fishings in the *tenendas* clause would be good. It is always good in charters from a subject. If the Duke of Queensberry and his predecessors had continued in possession, there would have been more difficulty ; but the direct contrary is the case. I think there is both a title and prescription.

KAIMES. A salmon-fishing is *inter regalia*, so that it passes by a particular symbol. There is no such thing here. If a man have a salmon-fishing from the Crown, may not that go as part and pertinent without any symbol ? It occurred to me, that no exclusive grant was given, but only a permission to possess promiscuously. It is proved, however, that the possession was not promiscuous, but as large as a vassal could enjoy.

JUSTICE-CLERK. The charter, 1649, not only grants the lands, but also the salmon-fishings, or what is equivalent to salmon-fishing. This conveys to my mind that the adjudger has taken the description from the title-deeds of his debtor, as mentioning a particular mode of fishing. There is some defect in the progress ; but the charter 1687 is a voluntary charter : bearing a *novodamus*, it confirms all the charters of apprising. If the Duke's challenge had been recent, there might have been more difficulty ; now there is a proof, on Lord Stormonth's part, of long possession, not for pleasure, but for profit : On the other side, a precarious possession, yielding no profit to the Duke of Queensberry. I do not find myself at liberty to play with the rights of parties, so as to take the subject from the Viscount and give it to the Duke of Queensberry.

KENNET. In order to acquire a right of prescription, there must be a title, and there must be possession. The defender has both. There is no doubt as to *possession*. The titles produced are not sufficient to give a right *per se*, but they are sufficient with possession. According to the present mode of revising charters in Exchequer, I would lay no weight upon the *tenendas* clause in a

crown-charter, because that is filled up at the seal. The case is different as to a charter from a subject. There is no common right here; because the pursuer has had, properly speaking, no possession at all. The whole tenants of his estate fished *tanquam quilibet* without acknowledging him.

AUCHINLECK. The argument of the Duke of Queensberry proceeds upon a mistake in our feudal law: some decisions there are which seem to favour the error; a charter is but one deed, comprehending in it the dispositive clause, *tenendas*, and *reddendo*. Originally, the *tenendas* contained the most material circumstance of all, the substitution of heirs: so matters stood till the reign of James I. The Barons of Exchequer have got into the practice of neglecting to revise the *tenendas* clause. Their predecessors must have done otherwise, because the *tenendas* bore the right of the grantee. It would be strange to argue, from the carelessness of the Barons of Exchequer, that the doers for private people are equally careless.

On the 4th August 1773, "The Lords found that Lord Stormonth, by his titles, joined to possession, has right to the salmon-fishings; and therefore assailed."

Act. G. Clerk, Ilay Campbell, R. M'Queen. Alt. A. Murray, H. Dundas, D. Græme.

1773. July 1. LORD ADAM GORDON *against* JAMES DUFF.

MEMBER OF PARLIAMENT.

Subjects to be valued.

[*Faculty Collection*, VI. 244; *Dictionary*, 8656.]

AUCHINLECK. Here boats were furnished to the tenants by the proprietor. This is no feudal property, but merely a rent arising from the furnishing. If one should have a coach-house, and let it with coaches and chaises, this would be no feudal property, as to the profit of coaches and chaises.

GARDENSTON. This is an imaginary valuation. By the same rule, a right of catching fowls in the air might be valued, as a right of catching fish in the sea.

PITFOUR. There can be no valuation of fishing, unless the fishings are held of the Crown: How can a white fishing be held of the Crown?

AUCHINLECK. The sasine is good, were there any thing to be seized in.

On the 1st July 1773, "The Lords repelled the objection to the sasine, but sustained the objection, that the fishing-boats was no feudal subject."

Act. H. Dundas. Alt. Ilay Campbell.

1773. August 6.—COALSTON. I doubt how far the King has a power of granting an exclusive right of white-fishings.

PITFOUR. Not in the sea, but in creeks.

ALVA. Have persons on whom such rights have been conferred, ever pretended to exclude others?

JUSTICE-CLERK. I will not inquire into the general question. There is a just foundation for a rent established on houses, boats, and fishing. From the conveniency of situation, fishers can afford to give a rent. Here is a fixed standing rent. There are such rents on many parts of the coast of Scotland.

On the 6th August 1773, "The Lords found that the freeholders had done right in enrolling Mr Duff."

Act. H. Dundas. *Alt.* D. Rae.

Diss. Alva. *Non liquet*, Coalston.

1773. November 17. SIR JOHN NISBET and OTHERS *against* The KIRK-SESSION OF WESTKIRK.

KIRK SESSION.

Heritors have no vote in the election of a Precentor and Session-clerk.

[*Fac. Coll. VI. 228 ; Dictionary, 8016.*]

KENNET. The Act 1696 gives no right to the heritors, neither does practice give them a right. My only doubt is, whether the session is not barred from their exclusive right of election by the agreement 1770.

HAILES. I think that the session did not surrender its right, and that it could not surrender its right.

COALSTON. There are no words in the agreement strong enough to bind the Kirk-Session in time coming.

On the 17th November 1773, "The Lords assoilyied;" adhering to Lord Auchinleck's interlocutor; and found expenses due since that time.

Act. Ilay Campbell. *Alt.* J. M'Laurin.

1773. November 30. JOHN COWAN and COMPANY *against* HENRY and KATHERINE STORARS.

MUTUAL CONTRACT.

[*Dictionary, p. 9142.*]

AUCHINLECK. This subject was moveable, and fell under the *jus mariti*. The aliment was *ex pietate*; for the subject did not, at that time, bear interest.

MONBODDO. The sum was not heritable, for it did not bear interest.

PITFOUR. The old form, in bonds, was to become bound to restore the sum borrowed at the next term, or else to grant an annuity till payment. If the debtor paid, at the term, no interest was due; if not, the debt became heritable.

COALSTON. The only difficulty is as to the wife's claim of retention till she is provided in an aliment. That claim is very equitable, but there is no law for it; the wife's aliment, during the subsistence of the marriage, must depend on the state of the husband.

On the 30th November 1773, "The Lords found that Henry Storar is not entitled to take credit for any expense which may have been incurred by him in alimenter, clothing, and educating Katherine Storar while her bond of provision was not exigible and bore no interest: also, Repelled the claim made by Katherine Storar, in her own right, and preferred John Cowan and Company;" (the creditors of her husband;) adhering to Lord Hailes's interlocutor.

Act. A. Bruce. *Alt.* R. Blair.

1773. December 3. CHARLES BARCLAY MAITLAND *against* JOHN TAIT and OTHERS.

COMMONTY.

[*Fac. Col. VI.* 69; *Dictionary*, p. 2485.]

COALSTON. If the proprietor had constituted a servitude for a certain number of cattle, he could not afterwards possess, so as to encroach upon a servitude so constituted; but that is not the case here.

KENNET. This is the only rule that can be followed, if possession goes as far back as the proof.

PRESIDENT. If the grant of servitude is according to use and wont, and the proprietor also possesses according to use and wont, his title is just as good as that of the person to whom he made the grant: this is agreeable to the decisions of the Court, particularly in the case of *Moffat*.

On the 3d December 1773, "The Lords found that the defender has a right to a servitude according to use and wont; but that the pursuer has a like right of possession, in so far as ascertained by immemorial possession; and remitted to the Ordinary to proceed accordingly."

Act. R. M'Queen. *Alt.* Ilay Campbell.

Reporter, Auchinleck.

1773. December 15. COMMISSIONERS of the ANNEXED ESTATES against SIR ROBERT MENZIES.

KING—PRESCRIPTION.

Operation of Prescription against the Crown.

[*Dictionary*, 7860.]

HAILES. It is singular that this question has never been determined one way or other. It would have occurred in a case, 1686, between *Sir George Mackenzie*, as king's advocate, and the *Landholders*, about the skirts of Drumshorelan Muir; but that question stopped at some preliminaries: I will not say by what means. [There is a tradition that the defenders gave Irish money, and compounded.] It occurred again in 1711, in a case where the *Earl of Leven* was a party; but that cause went off upon positive prescription. I do not think that the king could plead on the negligence of his officers. If that plea had been held tenable, it would have been used in 1590, in the following case recorded by Spotiswood. Cardinal Beaton had granted an obligation for a considerable sum to the treasurer for the behoof of James V. This debt was made over by James VI. to the Duke of Lennox. He pursued the heir of Cardinal Beaton. He pleaded, action is lost by negative prescription. It was answered by the Duke, not that the negligence of the king's officers could not prejudice him, but that Q. Mary and James VI. had been minors during great part of the time which had intervened. Spotiswood, Title *de Usucapionibus*.

As this argument was not then urged, though *rege præsente*, I think that it must be founded on the Act 1600, or not at all. I do not think that it is founded on the Act 1600:—1st, Because it seems to relate to a different matter; and 2^{dly}, Because Sir George Mackenzie does not venture to say that it relates to this supposed privilege of the Crown. There is a passage, indeed, quoted from Vinnius, which is abundantly strong, but it proves too much. For he says, or seems to say, that the *procurator fisci* has so much business to take up his attention, that the negative prescription ought not to take place against him, either in his own causes or in the sovereign's causes. This, with great submission, I hold to be very bad law. I consider it to be a compliment which Vinnius meant to pay to some great man in power.

JUSTICE-CLERK. There have been many occasions for the king's pleading this exception, but it never has been pleaded.

AUCHINLECK. The plea might have had a face in the reign of Charles II. but it has not in the reign of Geo. III.

COALSTON. There is an error which runs through the argument for the king's advocate, namely, that both the negative and the positive prescription are *in pœnam negligentiae*. All that the statutes do, is to confirm the natural presumption that, after long taciturnity, the debt was either not due or has been paid; and to make this a legal presumption, the argument in effect is, that natural and legal presumptions are not to operate against the Crown.

On the 15th December 1773, the Lords assoielyied.

Act. Advocatus. Alt. R. M'Queen. Teind-Court.

1773. December 15. UNIVERSITY of GLASGOW *against* ARCHIBALD HAMILTON
of Rosehall.

ARRESTMENT.

[*Faculty Collection*, VI. 252; *Dictionary*, 682.]

JUSTICE-CLERK. In a suspension there is a cautioner : none here. But whose fault is that ? The University has desired to have the suspension discussed on the bill, by which there is no caution found. The dependance arising from a suspension is of a different nature from that arising from a dependance on an action. When the Court passes suspension, it is aye and while the cause be discussed. This in so far detracts from the credit of the demand made.

MONBODDO. In this case I, as Ordinary, have turned the decret, or charge, into a libel : it is therefore a summons called, or depending action, and so arrestment is competent to force caution. Independent of this, it is said that no example can be produced of such arrestment. Hard to prove a negative : there may be many examples, of which we know nothing.

[It is difficult indeed to prove a negative, but the University may make an affirmative, by producing examples. Charles Inglis, the clerk of the bills, *rei attentus* as any man living knows none such.]

COALSTON. Here a charge given, suspended, decret turned into a libel ; hence a dependance, whereon arrestment may proceed.

KAIMES. A suspension is no more than a suspension of personal diligence. If I may adjudge during a suspension, why may I not arrest ? The one is in moveable what the other is in heritable subjects. In exercising this extensive right, there might be a hardship. But whenever any thing emulous appears, the Court will give relief from equity.

AUCHINLECK. I think that *here* there is a proper dependance. The cause is now in the shape of an ordinary action.

On the 16th December 1773, the Lords found arrestment competent in the circumstances of this case.

Act. R. Cullen. *All.* D. Dalrymple.

Reporter, Pitfour.

N.B. The Court was so much divided as to the grounds of the judgment, that, on the very next day, (17th December,) application was made to me, as Ordinary on the Bills, to grant letters of arrestment in a case precisely similar ; with this difference,—that the charge (or decret as it is called in practice) was not turned into a libel. My opinion went with that of Lords Coalston and Auchinleck, and I thought myself at liberty to refuse signing such warrant, in respect of the general terms of the interlocutor, (16th December.)

1774. January 14. ALEXANDER CRAWFURD *against* PATRICK CRAWFURD.

FOREIGN.

Testament executed abroad.

[*Faculty Collection*, VI. 258 ; *Dictionary*, 4,486.]

MONBODDO. This deed has a strong resemblance to the will in the civil law. L. 88, § *ult.* D. *de Legat.* 2. James Crawford desired that it might be valid either as a testament or as a partition among his children. He mentions the word *heirs*. We ought to give effect to this deed. The children cannot take the heritable subjects in Scotland directly, but they may, by a circuit, oblige the eldest son to make up titles and denude *pro rata*.

PITFOUR. It is impossible that this deed can be held as any thing else than a testament. It has no disposing words ; it does no more than express Mr Crawford's intention at that moment. Heritable subjects in Scotland cannot be conveyed by a deed in form of a testament.

COALSTON. Our countrymen in foreign parts constantly fall into the snare of using *testamentary* words, when they should use *dispositive*. It may be wished that this nicety of our law were altered ; but we cannot alter the law.

KAIMES. If heritable subjects in Scotland could not be carried by a Scottish testament, much less can they by a Dutch testament.

HAILES. I gave my opinion to the parties that the deed was a valid deed, as being executed in the form required by the law of the place. I doubted whether the heritable subjects in question were meant to be comprehended under the phrase ; but this doubt was removed by the opinion of Dutch counsel. As the pursuer sought not to take any thing by the deed, I considered it as ineffectual to convey heritable subjects in Scotland.

On the 14th January 1774, the Lords found that the deed in question could not convey heritable subjects situated in Scotland.

Act. Ilay Campbell, A. Lockhart. *Alt.* R. M'Queen.

Reporter, Hailes.

N.B. In the argument on this case the cases of *Barclay of Buenos Ayres*, *Lord Bunff's Succession*, *Mary Gainer*, *Auchterlony*, were mentioned. I believe that none of them applied : they were talked of from memory.

1774. January 15. ELIZABETH MOODIE *against* ROBERT RHIND, &c.

EXPENSES.

In this case the Lords repelled the objection that the account of expenses exceeded the sum libelled for in name of expenses.

It was observed that a pursuer could not know how far the litigiousity of his party might go, and that it would be inequitable to refuse him his just expenses because he had not concluded for them : That the case may be different as to damages ; for every pursuer may know, at the time of raising his libel, what damage he has really suffered.

It was also observed, that the contrary had been found in the case of *Marshall* against *Carnieson* ; but that, in a later case, stated by Lord Stonefield, at the foot of the table, the Lords repelled the objection.

Act. Ch. Hay. Alt. D. Rae. Concluded cause.

1773. *March 10. JOHN CARR of Cavers against ALISON CAIRNS.*

TAILYIE.

Import of a clause in a tailyie, that it shall be lawful for the heirs of entail to set tacks, the same being only for the lifetime of the setter, or for fifteen years, without an evident diminution of the rental, and, if made otherwise, to be void, and deemed a deed of contravention, and of a lease granted by one of those heirs for nineteen years, containing a clause of warrandice in common form, with an exception, that, in case the granter shall happen to die before the expiration of this tack, the obligation of warrandice shall not be extended any farther than what is consistent with the powers he hath by the entail with respect to granting tacks.

[*Faculty Collection, VI. 286 ; Dictionary, 15,523.*]

MONBODDO. The warrandice is for nineteen years, if Mr Carr lived ; if he died after fifteen years, the warrandice ceased.

JUSTICE-CLERK. The clause in the tack only goes the length of secluding an action of warrandice. This is not an action of warrandice. The tenant says he desires to be continued in possession. The entail, not being recorded, is not good against singular successors. A tacksman has the benefit of a singular successor, because the entail is not recorded.

KAIMES. As the entail is not recorded, the proprietor is absolute proprietor, and the lease will be good to the end of the world. Cavers says, I can set for fifteen years, and no more ; yet he sets for a longer space. *Quær.* Can the tenant, who is partaker of this legal fraud, derive any benefit from it ?

AUCHINLECK. If the clause, mentioning the entail, were not here, there would be nothing in the plea on the part of the master, because the entail is not recorded. The plea is, The tenant is not entitled to found on the not recording the entail, because not a *bona fide* contractor. The tack provides that it shall only be effectual in so far as consistent with the entail.

GARDENSTON. I think the tack is good. Such prohibitions are odious, interrupting the most rational acts of administration. There is no direct prohibition here. The second point is conclusive. If the tack had been granted

without the clause of restriction, it would have been good against all the world. The clause of warrandice implies only, that, if the granter has no power, there shall be no recourse.

KENNET. The intention of parties is clear : *contra bonam fidem* for the tenant to plead as he now does.

COALSTON. I doubt as to the first point. It is an established point that tail-yies are not to be extended by implication. The prohibitory clause in the entail strikes only against altering the course of succession and contracting debts. There is a clause seeming to suppose that there was a prohibition as to tacks.

PITFOUR. We must not supply a prohibitory clause in entails. We must not hold it the same thing whether an entail is recorded or not. The reference in the tack will not supply the want of recording. If you argue upon *bona fides* and *mala fides*, the Act of Parliament is at an end.

ALVA. This question seems to depend upon the intention of parties in the contract : and there I think there is no ambiguity.

MONBODDO. I have changed my opinion. There is no prohibition in the entail to set tacks for nineteen years. I will not supply the prohibition.

PRESIDENT. If we give this entail fair play, I do not see that we can hold it to mean any thing else than a prohibition to grant tacks for more than fifteen years.

On the 10th March 1773, the Lords repelled the bill of advocacy of the Sheriff's sentence decerning in the removing.

Act. H. Dundas. Alt. J. Swinton, junior.

Reporter, Pitfour.

Diss. Justice-Clerk, Gardenston, Coalston, Pitfour, Stonefield, Monboddo.

Absent. Strichen.

1774. January 18. GARDENSTON. The entail does not extend to this case. We must not increase the burden of entails by interpretation.

KENNET. We ought to consider the covenant between parties. Cairns did not stipulate any thing contrary to the entail, nor did Cavers mean to transgress the entail.

KAIMES. Cavers did not limit the lease, but only the warrandice. He leaves the tenant to make the most of any argument which arises from the import of the entail.

PITFOUR. I relish much this distinction. I do not understand this method of making entails good against a singular successor though not recorded. Inhibition is nothing, unless published and registered. The same is the case of entails. There is a difference between rights *jure naturæ* and by statute. If I know of a former sale, I do a fraud in purchasing ; not so in questions of statutory prohibitions.

AUCHINLECK. Suppose it had been said, Whereas there is an entail of my estate, but not recorded, and therefore I do not grant warrandice ; will this hinder the tenant from pleading that the entail is not recorded, and consequently not effectual.

KAIMES. This entail was prior to 1685. It cannot have a stronger effect

than if it had been made in consequence of the Act 1685. By that Act I may safely purchase when the entail is not recorded. If I may purchase, I may bargain for a lease. I approve of Lord Pitfour's distinction between moral and legal wrongs.

MONBODDO. The clause of warrandice cannot determine the tack. The setter had a doubt of his powers, and therefore he declared that he would not warrant the tack beyond his own life, or fifteen years. We have a good rule for the interpretation of entails, according to the legal and grammatical sense of the words. The words of the entail are clear, but then it is not recorded. Private knowledge is nothing. The entail is mentioned in the tack, but then it is not provided that the tack shall submit to its regulations; the tenant is left to take his hazard.

COALSTON. The case of this tenant is exceedingly favourable. I am sorry that the master has taken the advantage of the entail. This entail, not having been recorded, would have been ineffectual had it not been for the clause in the tack. I admit that private knowledge can have no effect: the entail only supports tacks for fifteen years on the life of the setter. It seems that the clause in the tack implies a consent by the tenant that the tack should only subsist as long as the entail authorised it.

On the 18th January 1774, the Lords sustained the reasons of suspension.

Act. H. Dundas. *Alt.* A. Lockhart. *Reporter,* Kaimes.

Diss. Alva, Hailes. *Non liquet,* Coalston. *Absent.* Strichen, Justice-Clerk, Ellick, Alemore, President.

1774. January 25. JAMES SIMPSON of Man *against* COLONEL ROBERT SKENE.

THIRLAGE—PRESCRIPTION.

The plea of the Negative Prescription, founded upon only a partial possession having been had by the dominant tenement, not admissible to limit the extent of a thirlage of *omnia grana crescentia* constituted by writ, where the obligation of thirlage, as originally constituted, has been repeated in the successive investitures of the servient tenement, the latest whereof, in favour of the defender himself, was much within the years of Prescription.

[*Faculty Collection*, VI. 262; *Dict.*, 10,746.]

COALSTON. The investitures imply an astringency as to *omnia grana crescentia*, but the practice is for liberty. The defence is, that the clause of *omnia grana crescentia* has been limited by means of the negative prescription: the negative prescription cannot operate against the superior; but whenever the superior disposes the mill, the thirlage becomes the subject of a prestation to a third party, and may be the subject of negative prescription. The case of *Grahame of Dougalston*, in 1735, is as strong as any thing can be.

JUSTICE-CLERK. When a superior stipulates a certain multure as the *red-dendo* of the vassal, there can be no negative prescription. When a thirlage is constituted by acts of Court, or by possession, as in king's mills or church mills; this may be lost by negative prescription. There is a third case where a thirlage is established by covenant. Even in that case a contrary usage may derogate from the written obligation: but my difficulty is this: Here is not only an obligation in writing once expressed, but a series of feudal titles all uniform. Every renewal of the title was a fresh acknowledgment of the thirlage. Suppose Colonel Skene should admit a disuse of an hundred years, what can be said against the precept of *clare* in 1760? After a disuse of a hundred years, the parties may agree anew for a thirlage; how can the negative prescription operate against the feudal obligation in 1760?

PITFOUR. The expression, *all grain in growing on the land*, may be limited by use to *grain consumed in the family*.

[This is inconsistent with the precept 1760, which expressly excepts teinds and horse corn.]

GARDENSTON. We have here not only an ancient astringency, but this repeated down to 1760: were this a new astringency, it would be good by the precept 1760. I thought that it was an established law, that a right provided in such writing could not be cut off by disuse in whole or in part.

JUSTICE-CLERK. The family of Kinross is superior of the mill as well as of the lands, and is liable to Colonel Skene in warrandice.

On the 25th January 1774, "The Lords found that the defender was astringed as to *omnia grana crescentia*," excepting teind, seed, and horse-corn; adhering to Lord Gardenston's interlocutor.

Act. A. Abercromby. *Alt.* A. Rolland.

Diss. Kaimes, Coalston, Pitfour, Alva, who were for a farther explanation of facts.

1774. January 27. DAVID RUSSELL and OTHERS *against* The YORK-BUILDING COMPANY.

RUNRIG—Act 1695, cap. 38.

- I. Benefit of the statute is competent to feuars even against their superior, without regard to the circumstance of some of the feuars called as defenders having their several properties in one plot, each by themselves, surrounded by the lands lying Runrig, (these particular feuars making no objections themselves,) and although the Runrig lands lay in the neighbourhood of a borough of barony.
- II. Competent in the division to set off the shares of the parties on either side of the town, as shall be most convenient for the general interest, without regard to the previous local possession of individuals.

[*Faculty Collect.* VI. 265; *Dictionary*, 14, 144.]

KENNET. A feuair obtains a small feu which, from its situation, does not en-

title him to insist in the action for dividing runrig. I doubt how far his acquiring another parcel of ground, at another place, can give him a title to insist.

COALSTON. The law under our consideration is a wise law, and has always received a liberal interpretation. This is the single case, where the most considerable heritor objects to the execution of the law. That, however, is of no moment. If the objection were well founded, it ought to have been made *in initio litis*, and, were it now sustained, I think the defenders ought to pay the expense hitherto incurred. There is nothing in the objection. Were it listened to, it would put an end to the Act of Parliament.

JUSTICE-CLERK. The objection ought certainly to have been made at the beginning, because it goes to the title of the pursuers.

On the 27th January 1774, "The Lords repelled the objection to the title."

Act. R. Blair, H. Dundas. Alt. J. Swinton.

Reporter, Kaimes.

1774. January 27. THOMAS FINLAY against THOMAS MORGAN.

INFETMENT.

- I. A precept of *clare constat*, having been granted to the person who was the apparent heir, in liferent, and to his son in fee, infetment taken thereon to them in the same terms, in so far as it was granted to the son in fee, found to be an erroneous infetment.
- II. Nor is it a good title of prescription to support adjudication without a special charge, led against the person so erroneously infet, within 40 years from the date of said infetment, and challenged within 40 years of its own date, and of the charter and infetment thereon, though after the expiration of its legal, so as to cut out the claim of his heir to the lands adjudged.

[Fac. Col. VI. 274; Dict. 6904.] *Supra* p. 357.

COALSTON. The objection may be a legal objection, but it is a thin one. A vassal is not bound to take a precept of *clare constat*, if it contains any variation from the former investiture. If he consents to take it to himself in liferent, and to his son in fee, there is no great impropriety in this. If the case of *Landaes* is not in point, which I have had no opportunity of considering, I would review the interlocutor formerly pronounced in this case. As to the second point; the title may be good by the positive prescription, which has the effect to establish the right of the grantee. An heir of entail makes up his titles, leaving out the irritant clauses, possesses for 30 years, then sells, the purchaser may impute the 30 years to make up his right by prescription.

KAIMES. All this is very right, if there was a *titulus habilis ad transferendum dominium*; but a superior cannot grant a precept of *clare*, except to the

heir : no, not with the consent of the heir ; *that* was the case of *Landales*. As to the case of the heir of entail, it is rightly put by Lord Coalston, because an heir of entail is a *fiar* absolute, though limited by clauses : when he departs from the entail, there is no more but a ground of reduction. There is a certain distinction between grounds of reductions and grounds of nullity.

PITFOUR. I cannot call back the judgment of this Court. The distinction was thin, but still there was a distinction.

JUSTICE-CLERK. The Court found the infeftment erroneous, and properly ; but, in effect, that resolves into a nullity : the precept is no title on which prescription could begin to run, for it gave the liferent to one who was *fiar*, and the fee to one who had no right at all. After the long course of time during which this right has remained, without challenge, I would support the diligence for the accumulated sums and penalty.

KAIMES. I cannot go so far in support of the adjudication : it was deduced not against a feudal debtor, but against an apparent heir.

HAILES. I have the same difficulty : How can we give such effects to an adjudication which we must, however unwillingly, find to be intrinsically erroneous ?

KENNET. The word erroneous was put into the interlocutor, that the separate defence of prescription might remain entire. The case of *Landales* does not apply ; *there* there was a *titulus habilis ad transferendum dominium*, but no prescription. Here the title is erroneous, and would always have continued so : besides, if it were a title for positive prescription, yet here another and a proper title was made up within the 40 years.

On the 27th January 1774, " The Lords restricted the right of the defender to principal sum, interest, and necessary expenses, accumulated at the date of the adjudication ;" varying Lord Kaimes's interlocutor.

Act. R. M'Queen. *Alt.* A. Wight, A. Lockhart.

1772. August 11. DOCTOR ANDREW HERON *against* CAPTAIN WILLIAM DICKSON.

MEDITATIO FUGÆ.

[*Faculty Collection*, VI. 248 ; *Dictionary*, 8550.]

HAILES. If a man may be thus summarily arrested upon no other evidence but the oath of the supposed creditor, without production of the ground of debt, we are in no better situation than the English are, by whose law a man may be imprisoned for debt where there is no debt.

AUCHINLECK. Although the grounds of debt were not produced at first, they are produced now ; which comes to the same thing. The only caution asked is *judicio sisti*.

PITFOUR. This is an improper use of the diligence of the law.

GARDENSTON. This extraordinary diligence, contrary to the common course of law, is not to be justified except upon clear grounds. I do not think the oath sufficient, when the debtor was only here occasionally. The expression, *meditatio fugæ*, points out what the law means. It is also of consequence that the ground of debt is not produced; not that the complainer is thereby hurt, but because of the handle for oppression this may afford. Diligence is never granted without production of the grounds of debt: Why admit that in an extraordinary diligence, which you would not admit in an ordinary?

AUCHINLECK. The tenor of the oath removes my difficulty.

PRESIDENT. Of the same opinion; but thinks that a summary warrant may be granted, although the grounds of debt are not instantly produced.

COALSTON. I doubt whether the remedy of a summary warrant does not apply, although the debtor have a personal estate and even a *real* within our jurisdiction. My difficulty is from the form of the oath.

On the 11th August 1772, "The Lords passed the bill of liberation, without caution or consignment."

Act. A. Lockhart. Alt. P. Murray.
Reporter, Kaimes.

1773. December 14.—COALSTON. There is a distinction between one who has a residence in Scotland and one who has not. In the *first* case, evidence must be given of a *meditatio fugæ*; in the *second* not. There is no occasion for an oath. In the Admiral Court, from a like necessity, the practice has been to begin with apprehending the party. The decision in the case of *Harris* proceeded on the same principles.

PITFOUR. When a man has a land estate, he has a domicile, and there is no occasion for this extraordinary diligence.

JUSTICE-CLERK. I would not encourage what is called *nimious diligence*; but I will not condemn an honest creditor, acting under a trust, in his attempts to recover a just debt. Here there was nothing *nimious* or oppressive in the diligence. Surely Dr Heron could have no difficulty in finding caution *judicio sisti*.

MONBODDO. Dr Heron had a residence in this country, but it was a residence *fictione juris*: in such circumstances, I would not punish a trustee for doing personal diligence.

GARDENSTON. If a man is imprisoned illegally, damages are due, no matter what was the motive for his imprisonment. The only question here is, Whether the warrant was legal. I think it was. I approve of Lord Coalston's distinction: the warrant here is exactly similar to a border warrant. There is no oath necessary; all that is required is, to say that the party is a foreigner: his having a domicile by having an estate in Scotland, signifies nothing: that does not make him less a foreigner.

ALVA. Extraordinary remedies ought to take place only in extraordinary cases. A man who has an heritable estate in Scotland, is amenable to our Courts without this summary warrant.

KAIMES. If a foreigner comes into this country, his creditor may say, You are a foreigner, and you must find security to remain where you are. The

only difficulty in this case is, that Dr Heron has the appearance of a land estate in this country. I do not think that this is enough to bar an extraordinary application: the creditor is not bound to take the whole circuit of the law, in order to operate payment. In some cases, *tutius est personæ adhærere quam rei*.

On the 14th December 1773, "The Lords assoilyied."

Act. A. Lockhart. *Alt.* P. Murray.

Reporter, Stonefield.

Diss. Pitfour, Alva.

1774. *January 28.*—COALSTON. The distinction is well established between one having a residence in Scotland and one not.

PITFOUR. I would be of the same opinion, were it not that Dr Heron has a land estate.

JUSTICE-CLERK. The caution required was not severe, it was only *judicio sisti*: when there is a suspicion of a *meditatio fugæ*, the arrestment will be good, although there is a land estate. Dr Heron must be considered as a stranger, because his residence was in London: there was no oppressive intent here, but a laudable purpose of doing the duty of an executor.

AUCHINLECK. I do not like a man who tries to shake himself loose of a debt by a complaint of this kind.

On the 28th January 1774, "The Lords assoilyied Captain Dickson;" adhering to their former interlocutor.

Act. A. Lockhart. *Alt.* P. Murray.

1774. *January 28.* ISOBEL WRIGHT *against* MESSRS ANDERSON and LAURIE.

ARRESTMENT.

Case where Arrestment laid on the same day, at different parties' instance, one execution bearing between the hours of five and six, and another execution bearing between the hours of five and seven, were preferred *pari passu*, on account of special circumstances, and particularly that of one messenger having served the whole arrestments.

[*Fac. Coll.* VI. 272; *Dict.* 823.]

PITFOUR. When we go to examine minutes and hours, there must be a demonstrative priority: without that, arrestments must come in *pari passu*.

HAILES. The conjecture of the Ordinary is certainly right. The messenger first arrested in Edinburgh, then in Leith, and then again in Edinburgh: no reason can be assigned for his having arrested at Leith at different times: his execution does not say so.

COALSTON. It would have been a gross breach of duty, had the messenger not executed both arrestments at the same time, while he was possessed of both diligences.

On the 28th January 1774, "The Lords preferred the arresters *pari passu*;" adhering to Lord Coalston's interlocutor.

Act. R. Blair. Alt. D. Armstrong.

1774. February 4. JOHN REYNOLDS of London, Merchant, against JAMES SYME and JOHN WEMYSS.

BILL OF EXCHANGE.

A bill drawn from Scotland upon England, is accounted a foreign bill, as to the time limited for notification of its dishonour.

[*Faculty Collection*, VI. 280; *Dict.* 1,598.]

HAILES. No one values the Union more than I do. The best way to preserve that Union inviolate, is, to take care to preserve the distinction between the covenants and laws of the two parts of the United Kingdom. A bill drawn upon a merchant at London, payable at London to a merchant at London, is a foreign bill with respect to Scotland; just as a bill drawn upon a merchant at Edinburgh, payable at Edinburgh, to a merchant at Edinburgh, is a foreign bill with respect to England. The English authorities for this are express. The English would not consider the bill in the latter case as *inland*: why should the Scots in the former case? As to the notification on the fifth post-day, the allowing three posts does not mean either three days or six days, but only so many opportunities of notification. When opportunities are more rare, a longer space will be allowed. When more frequent, a shorter. The great purpose of multiplying the post-days was, that intelligence, especially of this kind, might be more expeditiously conveyed from one part of the kingdom to another. *Here* the argument is, that intelligence must be understood to be no more expeditious now with *five* posts in the week, than formerly with *three*.

MONBODDO. I imagined that, before the late Act of Parliament, even inland bills, if dishonoured, were to be intimated within three posts. I think that *three* posts mean *three* opportunities.

COALSTON. In questions that strike so deep as to merchants, in a matter of pure mercantile law, I would have wished to know whether the alteration of the posts had made any difference in practice.

ALVA. If we deviate from the rule of three posts we render every thing dubious.

AUCHINLECK. The public posts are known to every merchant. They have been established for many years. The defenders have not availed themselves

of the opportunity of notifying the dishonour which the Postmaster-General afforded them.

PITFOUR. Bills between England and Scotland ought not to be considered as *foreign* bills. For goods coming from England to Scotland have been found not to be *foreign* goods.

[The point was of his own starting. *To render the union more complete*, he could not bring one judge to incline to his opinion.]

On the 4th February 1774, "in respect that it is not denied that the practice is to intimate the dishonour of bills of this nature within *three* posts, the Lords found no recourse due."

Act. W. Nairne. Alt. G. Wallace.

Reporter, Pitfour.

1774. February 9. JEAN GRAHAM and Her HUSBAND against Mr JAMES BAIN.

CONDITION.

Import of a clause in a settlement by a grandfather, that, in the event of his grandchildren marrying without first having advised with his trustees, and obtained the consent of the majority of them, regularly entered in the sederunt book appointed to be kept by them, and duly signed; the grandchildren so marrying shall forfeit their provision under that settlement.

[*Fac. Coll. VI. 282 ; Dictionary, 2,979.*]

COALSTON. Here the question is between the words and the intendment of the testator.

GARDENSTON. The young people knew nothing of the proviso. The consent of the grandmother was granted; she was the trustee most interested. Mr Kincaid, another trustee, gave his consent, because he thought the intended husband a deserving man. The other trustees were not consulted, because Mr Kincaid did not recollect the clause in the deed, and consequently made no mention of it to the parties.

HAILES. I doubt how far a man can lawfully throw in such a proviso, leaving a succession of strangers to determine as to the fitness of matches offered to his descendants. According to this rule Mr Bayne, and his session, may have the presentation to all the young women of his flock.

On the 9th February 1774, "the Lords found the provision due;" adhering to Lord Gardenston's interlocutor, and refusing a petition without answers.

For the Petitioners, Charles Hay.

1774. February 15. MARY CLOWDEN against JOHN CULTON of Auchnary.

PROOF.

In a declarator of marriage, the man in defence accused the woman of incontinency. The Lords adhered to an interlocutor of the Commissaries, refusing a proof of the allegation, *in hoc statu*, reserving the same till the pursuer should establish her marriage. In this case no actual celebration was libelled on, but a written declaration and subsequent *copula*.

[*Folio Dict.*, IV. 171 ; *Dictionary*, 12,683.]

AUCHINLECK. Great expense attends a process of divorce. I am bound to presume for innocence. The woman brings a process of declarator of marriage. In that she can have no aid but from herself. If she once prevails, and then the husband brings a process of divorce, she is entitled to an interim aliment, and the husband must pay the expense of the process. If the declarator of marriage is not made to precede the proof of incontinency, she will have two suits to maintain instead of one. This expense will be such, that, should we follow the rule proposed by the defender, the woman must succumb from the want of the means to defend herself; and therefore the judgment of the commissary is founded on the highest expediency.

PITFOUR. There is a great difference in the nature of the proofs offered by the parties. The pursuer offers to instruct marriage by writing under the defender's hand: the defender offers to instruct incontinency by witnesses. He wants to go a-fishing for circumstances. The woman cannot afford to follow him: besides, his offer to prove incontinency, *hoc statu*, is, as the country people say, putting the plough before the oxen.

HAILES. I think that the judgment of the Commissary is perfectly right in allowing the marriage to be first of all established. This defender desires to prove himself a cuckold before he is proved a married man. If he is not married, what right has he to prove her incontinency. If she is *soluta*, she may have lain with all the men in the parish; it is no concern of his.

KAIMES. There is no actual marriage here, and therefore no occasion for an action of divorce. A covenant for marriage is not sufficient. Parties may, *impune*, resile *rebus integris*. A *copula* is required; after which parties may not resile without cause. Will an agreement to live as man and wife, joined with a *copula*, be sufficient to make a formal marriage? No; it only creates an obligation to celebrate a marriage *in facie ecclesiæ*. The commissaries' decree is tantamount to such a celebration. When there is an actual marriage *in facie ecclesiæ*, I would not allow a proof of incontinency till that marriage be once formally ascertained. The case here is different: no marriage is alleged, but evidence is offered that there was an obligation to marry. I would allow the man to prove the woman's incontinency as a good reason for not fulfilling the obligation. As to the expense, equity might perhaps interpose in behalf of the

woman. To save expense, I would allow both actions to go on *simul et semel*.

COALSTON. My doubt is, whether Lord Kaimes' argument will apply to this case. A contract to marry may be resiled from. When a *copula* follows, *res non est integra*. Here there is not an action to solemnize marriage, but a declarator of marriage. It seems to me that there is written evidence of an actual marriage; and the woman farther offers to prove acknowledgments of marriage. The judgment of the commissaries is founded not only on expediency, but justice. This will appear from considering the legal effects of a declarator of marriage, and of an action of divorce. The declarator, after sentence, draws back and entitles the pursuer, and her issue, to all the benefits of marriage from the date of the marriage. The decret of divorce does not declare the marriage void before the date of the decret; and therefore the wife and the children are entitled to the intermediate benefit of the marriage. Hence it follows that it would be unjust to make the action of divorce go before the declarator of marriage.

KAIMES. I admit that all this is good when there is so much as a habit and repute marriage libelled; for that presumes a regular marriage. But *here* there is no living together as man and wife. On the contrary, we see the *initium*; which is not a marriage.

MONBODDO. I always held it to be a maxim that *consensus facit matrimonium*. There must be a *rei traditio*, which we call a *copula*. If the defender will prove that a man could not marry a whore, he would say something. I never heard of an action for obliging a man to perform the ceremony of marriage.

GARDENSTON. I cannot agree with the doctrine laid down by Lord Kaimes. There are two species of marriage equally effectual by our law; the one solemn, the other clandestine. A clandestine marriage branches out into many sorts. The parties therein concerned are liable to pains and penalties, but still such clandestine marriages are valid. There are many instances of decrees finding such marriages proved. The case of *Loup* in particular was strong, and applicable to this case. One great argument in support of the commissaries' judgment is, that children have an interest to have their state declared. It makes no difference that in this case there are no children; for there must be one uniform rule.

JUSTICE-CLERK. I believe that, in the early period of our law, after the Reformation, when the sacerdotal benediction was much esteemed, the course was to decern the party to celebrate the marriage. But, for a long time past, the practice of the Commissary Court is totally altered, and the constant conclusion is that the parties be decerned to *adhere*. The argument used by Lord Kaimes may apply to the case where parties, having agreed to celebrate a marriage, an action arises *ex contractu*: the man may have a good defence, that, since the date of the agreement, the woman had been incontinent.

On the 15th February 1774, "the Lords refused the bill of advocation, and remitted to the commissaries *simpliciter*."

Act. A. Crosbie. Alt. R. M'Queen.

Reporter, Gardenston.

1774. February 22. DOUGLAS, HERON, and COMPANY *against* MR BARON GRANT.

DECLINATOR.

IN this case Lord Hailes proponed a declinator against himself, as being the brother-in-law of Sir Adam Fergusson, one of the partners of the Douglas and Heron's Bank. He observed that, if Sir Adam had been one of two or three partners in a private merchant company, the declinature would have been certainly good. Thus the Lord Justice-Clerk was always allowed to decline himself where J. Murdoch and Company were parties, because John Murdoch, a partner, was his father-in-law. And, where Mansfield and Company were parties, because P. Miller, his brother, was a partner, it was observed by some of the judges, that partners in the Royal Bank were allowed to vote, and that the interest of any partner in so numerous a company as that of Douglas and Heron was small. It was answered that the Royal Bank was a corporation, and that the partners in it were not parties in any action, for that such action always went in the name of the governor and directors; that the smallness of the interest of each individual in the Douglas Bank, supposing it small, can make no difference, if the interest is direct, for a declinature will not be repelled when the concern of the judges relation is *small*, and sustained when *great*. *Majus et minus non variant speciem*. At length the Court examined into the state of its members present, and found that a similar declinature lay against so many of the judges, that, if it was sustained, there would not be a *quorum* left; and therefore they, from the necessity of the thing, repelled the declinature. They must determine the causes which come before them; and it was considered that declinatures must be repelled, when, by their being sustained, there would remain no *quorum* for determination.

1774. February 23. CAPTAIN THOMAS DUNBAR *against* CAPTAIN DUNCAN URQUHART.

MEMBER OF PARLIAMENT.

On a freeholder's disposing his lands with procuratory and precept, it is sufficient to preserve his right, that, in the procuratory, and likewise in a separate obligation, the disponent is taken bound not to execute the procuratory.

[*Fac. Coll.*, VI. 289; *Dictionary*, 8826.]

MONBODDO. Though a man has sold his estate, he is still entitled to stand on the roll, if not denuded. The only remedy is the trust oath: That is, between God and his own conscience.

KENNET. The purpose of parties was that the liferent should be retained. The procuratory of resignation does not entitle Sir James Grant to be infeft. During the life of Captain Dunbar, Sir James Grant could not *bona fide* have taken infeftment.

GARDENSTON. Captain Dunbar was formerly proprietor : how is he divested ? He is not, nor can he be habilely divested during his life.

AUCHINLECK. The bargain was fair, but the parties went to work in a bungling manner.

On the 23d February 1774, " the Lords appointed Captain Dunbar to be put on the roll."

Act. A. Lockhart. *Alt.* R. M'Queen.

1774. February 23. MR JAMES COLQUHOUN, Advocate, *against* CAPTAIN DUNCAN URQUHART.

MEMBER OF PARLIAMENT.

Previous registration for year and day, of a renunciation, by a liferenter, is not requisite to entitle the fiar to vote.

[*Faculty Collection*, VI. p. 291 ; *Dictionary*, 8750.]

GARDENSTON. Here there is a fiar and liferenter. The fiar is entitled to be enrolled : will it hurt his right that the liferenter has no right ? Suppose that he had been enrolled, and that afterwards the liferenter had renounced. By the objector's doctrine, he ought to be struck off the roll on account of his change of circumstances to the better.

[This was a stroke of humour which proved nothing.]

KENNET. As to the valuation of the lands, overblown with sand, the order of the treasury did not take effect. Supposing that the treasury had power to make it, I have some difficulty as to the objection, that the renunciation was not before year and day.

On the 23d February 1774, " the Lords appointed Mr Colquhoun to be enrolled *simply*."

Act. J. Grant, A. Lockhart. *Alt.* R. M'Queen.

1774. March 5. ROBERT WATSON *against* HIS CREDITORS.

CESSIO BONORUM.

THE pursuer was apprehended on a *meditatione fugæ* warrant, and committed to prison until he found caution *judicio sisti*: he did not find caution; but pursued a *cessio bonorum* against his creditors.

The following opinions were delivered:—

HAILES. I doubt how far a man who has been imprisoned till he should find caution *judicio sisti*, can pursue a *cessio bonorum*: he is not imprisoned for a debt, but *ad factum præstandum*: he may surely find caution to appear if he has any character at all. The question is not new: the Court has repeatedly held the objection to be good.

[Mr Dickson, for the pursuer, quoted a case, *Thomas Small against Sir James Clerk* in 1764.]

COALSTON. At this rate, the pursuer must lie in prison for ever. He says he cannot find caution. If we permit not the *cessio* to proceed, where is his remedy?

KENNET. His remedy is in a suspension and liberation on juratory caution: this will set him at liberty: if thereafter any of his creditors should incarcerate him, he will be in the shape of the law.

MONBODDO. I should doubt more of the legality of that remedy than of the one sought. There must be a relevant ground of suspension before we can grant liberation. We cannot give a man his liberation merely because he cannot pay.

On the 5th March 1774, “The Lords found that, in this case, the pursuer may insist in a *cessio*.”

Act. J. Dickson. *Alt.* Absent.

N.B.—This *humane* interlocutor was pronounced with but two or three contradictory voices, and without a vote. It overturns what was considered to be law. Great is the favour of every man who appears in the shape of a *dyvour*.

1774. March 9. MESSRS STIRLING and COMPANY,—*Chargers*; against ROEBUCK, GARBET, and COMPANY,—*Suspenders*.

PRIVILEGE.

Found a good objection to a Scotch patent, that previous to its being granted the art was known and practised in England.

[*Fac. Coll.*, XIII, 218; *Note, App. No. I.*; *Privil. No. II.*]

THE suspenders, Messrs Roebuck and Company, obtained, by letters patent under the great seal of Scotland, the exclusive privilege of exercising the art of manufacturing oil of vitriol *in vessels of lead*, within Scotland, for 14 years. The chargers, Messrs Stirling and Company, having erected a vitriol work for carrying on the same process, Messrs Roebuck and Company presented a bill of suspension for the purpose of having them stopped. When the cause came to be argued, the chargers stated the following objections, *inter alia*, to the suspender's patent:—

1mo, They stated that the mere substitution of vessels of lead instead of vessels of glass, in the manufacture of the commodity in question, was not entitled to be considered a new invention. That it was acknowledged by the suspenders, that the art of making oil of vitriol had been long known, and publicly exercised, and they did not pretend to have made any discovery in the manufacture of the commodity itself. The mere using of cheaper and more commodious vessels, was no new invention entitled to the protection of a patent.

2do, Even the use of leaden vessels was no new thing on the part of the suspenders at the time when they applied for the patent, although they stated the case to be otherwise in their petition to the crown: the fact was, they had carried on this manufacture in vessels of lead for 20 years past.

3tio, The use of leaden vessels was not an invention of the suspenders at all. Long before the patent was obtained, the use of lead vessels was known and practised by various persons *in England*.

The suspenders ANSWERED,—1mo, Although they had not discovered the art of making oil of vitriol, they had discovered a new mode of making it, which was enough to entitle them to a patent. The art of extracting oil of vitriol from sulphur alone, was known more than 100 years ago, and yet Dr Ward got a patent for extracting it from a mixture of sulphur and saltpetre, which was merely a new mode of doing the same thing which had been done before.

2do, The suspenders had not used leaden vessels so long as the chargers alleged. But, moreover, they contended, in point of law, that it was not necessary to apply for a patent the moment a discovery was made. An invention is new, *quoad* the public, if not previously known and publicly practised.

3tio, The statement that the use of leaden vessels had been publicly practised in England before the granting of this patent, is not relevant, supposing it were true. A patent may be obtained by a person who first introduces an

art or manufacture into this country, although it has been previously known and carried on in foreign parts; Hawkin's *Pleas of Crown, tit. Monopolies, lib. 1, c. 79, § 6*; Bacon's *Abridgement, voce Monopoly*; case of *Edgeberry, Salk., 2—447*; 5th Geo. II., c. 8; and England is a foreign country with regard to Scotland.

A proof was taken, by which it was established, that the mode of manufacturing oil of vitriol in leaden vessels, had been known and practised in England previous to the patent.

The following opinions were delivered :—

HAILES. A very momentous question occurs here: Messrs Roebuck and Company contend, "that although they were not the inventors of making oil of vitriol in lead vessels, still their patent must be good to exclude others, because they were the first that practised that art in Scotland." Your Lordships will not establish this proposition without maturely weighing its consequences, which seem exceedingly strange. I will explain what I mean, by a few familiar examples: The first stocking-loom in Scotland was established at Glasgow between 30 and 40 years ago. According to Messrs Roebuck and Company, the man who first established that stocking loom, might have sought and obtained a patent, prohibiting all others in Scotland from establishing a stocking-loom in Scotland for 14 years: the same would be the case as to the still later establishment of looms for silk, gauze, and ribands, so necessary in the present ruined state of our linen manufactures. At this day, the working of velvet or of any other manufactures used in England, but not in Scotland, may be circumscribed by patent for 14 years, that is, all new manufactures may be limited, in Scotland, to one man for the space of 14 years. The only person in Scotland who has used Dr Franklin's conductor for lightning, is Dr Lind; were that gentleman less benevolent than he is, he might monopolize Dr Franklin's invention in Scotland for 14 years. According to the suspenders' argument, he, as the first user, though not the inventor, may have a patent. Although lightning were as frequent and as fatal in Scotland as in Virginia and Pennsylvania, no man could use the conductor without Dr Lind's permission, no not even Dr Franklin himself. Take the latest invention of all, Dr Irvine's method of making salt water fresh: the process is simple; I may set it agoing in Scotland, procure a patent, and prohibit all the inhabitants in Scotland from making salt water fresh. Again, there is in Edinburgh one Dallaway, who understands the method of enamelling on white iron, as practised at Birmingham. This art is not known in Scotland; it is a manufacture which would maintain thousands of hands: there can be no doubt of the *publicus usus et exercitium* of Dallaway, for I have seen of his work; he may therefore obtain a valid patent to-morrow, and prevent the further introduction of the manufacture into Scotland for 14 years. Many more examples might be given; but these may suffice to call your Lordships' attention to this question, Whether that proposition can be true in law, whereof the consequences are obviously ruinous to the whole system of improvements in Scotland.

GARDENSTON. Here is such an improvement as may be held an invention. There is nothing in the objection, that Roebuck and Company had privately

carried on the trade for a number of years. The great difficulty is here, that the work in lead vessels had been carried on in England before the date of the patent. I should even doubt whether a patent might be granted to the person who first introduced any foreign invention into Britain. In matters of prerogative, there is no distinction between England and Scotland. This distinction was taken away by the happy *Union*.

KAIMES. This is a matter of considerable moment, because it concerns the good of the public and manufactures. The suspenders take the benefit both of the Act of James the *First*, and of the general prerogative of all princes, touching patents to new inventions. The radical point is, whether Messrs Roebuck and Company have invented any thing material?—They certainly have. The use of lead vessels instead of glass, is a matter of great moment. It has been said, that, if the use of lead vessels was known in England before the date of the patent, Messrs Roebuck and Company cannot support their patent; and to illustrate this, the use of the stocking-loom, &c. has been mentioned. I am not sure that the king could not have granted a patent to the person who introduced the stocking-loom into Scotland. The cases, however, are different, for the stocking loom was a public manufactory in England, to which every one had access; whereas they who made oil of vitriol in lead vessels at Bridgenorth or Bewdly, wrought privately, and work privately still.

MONBODDO. The invention of Messrs Roebuck and Company has proved useful: It has been found by this Court that it is sufficiently published. I do not see the case of *The Glasgow Merchants* in so favourable a light: they had no certain knowledge of Roebuck's method: they sent one of their servants to corrupt the servants of Roebuck, and to discover the secret. Yet we must determine upon grounds of *law*, not of *favour*. The *first* objection is, That there is no new discovery. *Ans.* Call it a discovery, or call it an improvement, it is so material as to entitle Messrs Roebuck and Company to a reward. The *second* objection is, That the patentees had used this method for 14 years before the date of the patent. *Ans.* 1st, In point of fact, it is long since they began to try it; but they did not till of late bring their trials to perfection: 2d, There was no occasion for applying to obtain a patent till there was a danger of discovery. The *third* objection is, That the discovery was not made by Roebuck and Company. I do not see any evidence of the art having been practised in Scotland. The charger's pretensions for discovery are ridiculous. It is acknowledged that there is no proof as to Steel. With respect to England, that the art was practised in England before the date of the patent, I am satisfied. It is probable that the discovery came from Roebuck himself, by the treachery of one Fauconbridge, a discarded servant. [This is a probable conjecture. The company gave Fauconbridge 10s. a-week, and, on his proving idle and drunkensome, dismissed him. It is likely that he told all he knew to the English artists, and that though he might not be able to explain the whole process, yet could tell enough to set chemists on the right scent: it was a poor saving in the company to suffer so dangerous a man as Fauconbridge to go at large, because he was not worth his wages.] However, I lay not stress on the circumstance of the discovery having come from Roebuck and Company. The question then comes to this, Will not Roebuck's patent be good, as he first brought the art into Scotland? Even in that view, as the introducer of

this art, he is a great benefactor to the nation. The art was not publicly practised in England: its being secretly practised there, will not affect Roebuck's patent. But I will suppose that the art was publicly practised in England: still I think it the same thing as if Roebuck had introduced it into Scotland from beyond seas. In the sense of law, England, with respect to us, is beyond seas. [There is a decision of the Court, finding the contrary in express terms.] The article of Union touches not this case. This is not a matter of trade, though it may be useful in *trade*. There is no communication of the law of patents between the two nations.

COALSTON. I am clear that there is no relevancy on the first and second objections. My sole difficulty lies on the third objection, That this art had been practised in England, and elsewhere, before the date of the patent. There is no proof either as to the Stirlings or as to Steel. It is not sufficient that others may have *known* it, if others did not *use* it. The patent will be good: so says the Act of King James I., which the parties admit to be the law of Britain; but the evidence of its having been practised in England, is sufficient to void the patent. I admit that its being practised in foreign parts would not be a good objection. It is proved to have been practised at Bridgenorth and Bewdly: this, I think, is a good objection, in the words of the Articles of Union. Upon this clause of the Articles of Union, the statute of James I. is admitted to be the law of Britain. At the time of the Union, there was scarcely one manufacture properly practised in Scotland. Most of the manufactures now known were then known in England. Was it agreeable to the statute of Monopolies, or to the Articles of Union, that any subject of Scotland could apply for a patent respecting any manufacture known in England but not in Scotland? This cause falls to be determined upon the Articles of Union. If there was any doubt as to this, the arguments *ab incommodo* are unanswerable. As to what is said, that this art is kept secret in England, the truth is, that manufactures, especially in the chemical way, are kept secret as much as possible even after a patent.

[He might have illustrated this by the case of Roebuck's own works, where, notwithstanding the patent and specification, the secret of the process is carefully preserved.]

JUSTICE-CLERK. I would repel the first and second objection; but the *third* is irresistible. As to what is said, that this business is kept a secret, it is notoriously known that many of the most valuable manufactures in England, whether with patent or without, are conducted with all imaginable secrecy. The words *publicum exercitium*, though in the patent, are not in the statute. I should be sorry that we adopted this rule of decision, holding that a patent would be good against establishing manufactures in Scotland which are practised in England, though in a secret way. We have evidence co-extensive with the discovery made in Chancery, that the manufactory is carried on in lead vessels in England: this destroys the evidence from the king's patent, that Roebuck was the original inventor. The law of Monopolies is general, with the exception of the first inventor.

GARDENSTON. In the case of *Clark* against *Laycock*, decided in the King's Bench, Clark had a patent for both kingdoms: his patent was set aside upon

the evidence of Scots witnesses, that the art had been practised in Scotland before the date of Clark's patent.

MONBODDO. I regard not arguments *ab incommodo* : we must judge according to law, not conveniency. If there are such evil consequences from patents, why, let the King grant none such, or let the Legislature regulate them.

[He misunderstood me. I endeavoured to show, from the consequences, that that could not be law which necessarily produced such effects.]

On the 4th March 1774, "The Lords found it proved, that the method of making oil of vitriol in vessels of lead, was practised in England before the date of Messrs Roebuck and Company's patent; and therefore found the letters orderly proceeded."

Act. J. M'Laurin, A. Lockhart. *Alt.* A Crosbie, H. Dundas.

Reporter, Justice-Clerk.

Diss. Kaimes, Pitfour, Monboddo.

1774. March 10. GEORGE ROSS of Cromarty, &c. *against* SIR RODERICK M'KENZIE, &c.

MEMBER OF PARLIAMENT.

It is competent to any Freeholder to challenge decree of valuation, though he has no other interest in challenging it than merely to support the objections to enrolment for Freeholders.

[*Faculty Collection*, VI. 294 ; *Dictionary*, 8663.]

HAILES. I will give my opinion in two words: I am clear as to the jurisdiction of this Court. I might hesitate as to the power of the freeholders, were it not for a series of decisions which cannot at present be departed from. I would therefore follow the course which we have held for so many years.

GARDENSTON. I am as *laconically* of the same opinion.

KENNET. I wish to see decisions uniform, especially in election matters. I have no doubt as to the jurisdiction of this Court, which indeed is not much disputed. As to the second point, it is established properly: at any rate, it is *established*. If the Court does not allow this power in one shape or other, either *ope exceptionis* or by reduction, the power of naming members of Parliament will be in the commissioners of supply.

PITFOUR. If the Act 1681 had not been the rule, I should have had no objection to the absolute power of the commissioners. I once heard it said, in French, of judges, *Ils oublient les personnes, ils attendent aux choses*. With the commissioners of supply, the rule is inverted, *Ils oublient les choses, il attendent aux personnes*. The distinction of *ex facie*, or not, is a good one; things that require proof cannot be taken up *ope exceptionis*.

MONBODDO. I am of the same opinion, both from principle and practice. By giving up the *first* point, the parties give up the second. If this Court has a power to redress wrongs, it would be singular were no person to have a right to complain of the wrong? A freeholder may complain, for he has a privilege, though not a patrimonial right.

JUSTICE-CLERK. Notwithstanding the precedents of the Court, I should have no scruple to resort to principles. It is my firm belief that they who had the penning of the Act 16th Geo. II. had no idea that it was in the power of a single freeholder to stop enrolment, either by objection, complaint, or reduction, upon exceptions taken to the decreets of commissioners of supply. I think the law has vested the trust in the commissioners; and that when a decret, perfect in itself, is laid before the freeholders, it is sufficient, as much as an old retour. Whenever the evil arising from the abuse of such powers becomes grievous, the nation will seek a remedy from the legislature.

COALSTON. I should be exceedingly happy, if, without endangering the rights of the subjects, we could find that neither this court, nor the freeholders, could question the actings of the commissioners of supply. It would relieve us of an intolerable load of causes. I think that this Court, as the Supreme Court in civil causes, and also a Court of equity, has a power to review the proceedings of all inferior courts, even in cases where this Court has no original jurisdiction. This right has been introduced as in confirmation of testaments, declarators of marriage, processes of divorce. When individuals are appointed Commissioners of Parliament, this Court may review their proceedings. The Commissioners of Supply are not a committee of Parliament more than commissioners for turnpikes, canals, &c. Upon the proceedings of the Commissioners of Supply, many important matters depend. It is admitted that parties patrimonially interested may complain. *This* supposes a jurisdiction and a power of redress. Suppose a superiority of L.1000 *per annum* were sold at a judicial sale, that A purchases one half, and B the other, the Commissioners of Supply divide and give L.700 of the valuation to one, and L.300 to the other; could not the person who gets but L.300, apply for redress? A subject which has a qualification to vote would sell higher than one without it. If there are but two freeholders in a county, their interest is greater than if there were a hundred. If an interest is once admitted, there must be a jurisdiction. A distinction has been made between objections appearing *ex facie* of the decret and not, and a sub-distinction between what strikes at the power of the commissioners and what at their proceedings. I cannot see those distinctions: 80 out of 100 of the decisions of this Court have proceeded upon iniquity appearing *ex facie*. Several of those decisions have gone to the House of Peers, and that House has determined as if there were a jurisdiction. What the House of Peers may hereafter do, I consider not myself as bound to inquire.

KAIMES. A decret of the Commissioners of Supply is like any other decret, good till reduced. If it is null, *ex facie*, it is no decret at all. I have no doubt as to the power of the Court of Session to redress wrongs, unless they are expressly debarred by Act of Parliament. The only question is, at whose instance shall the complaint proceed? This has been cleared up by my brethren who have already spoken. The only difficulty is this: One freeholder tries to reduce, and fails: another may try again; this is an inconveniency, but the like often occurs in the law of Scotland. The only *salvo* for this, is that

all concerned may complain from the beginning ; and, if they do not, they will be held as having acquiesced.

[It seems as good an answer to say, that it is at least a presumption, that the Court will repeat the judgment between A and B which it gave between B and C, if the cause is the same, and that no man in his judgment will try a question that he has almost a certainty of losing with costs.]

AUCHINLECK. Anciently, when valuations were introduced, it was not thought that in 1774 there was to be such a struggle about " who should pay most." This alteration in the disposition of men requires attention. If the decision in all cases was left to the Commissioners of Supply, there would be great injustice committed. They are not *kinless, rascally*, as was said of Oliver's judges. I therefore think we should go on as we have done formerly. The parties are able and willing to seek redress in the House of Peers. If they do so, I shall be well satisfied ; but I would rather wish to have a good Act of Parliament for cutting off those rascally votes.—[He added, in a half-whisper, " in which I myself am concerned."]

On the 10th March 1774, " the Lords sustained the jurisdiction of the Court, and also found it competent to the freeholders to make the objections."

Act. D. Rae, Ilay Campbell. *Alt.* H. Dundas, A. Lockhart. Hearing in presence.

1774. *March* 11. EMELIA FRASER *against* ALEXANDER ABERNETHY.

ALIMENT—HUSBAND AND WIFE.

Interim aliment allowed to a married woman pursuing a divorce.

Mrs Abernethy insisted in an action of divorce against her husband for adultery. She applied to the Commissaries for an interim aliment ; they refused it : she presented a bill of advocacy. Lord Pitfour, without hearing the other party, remitted to the Commissaries, with an instruction to give L.30 in name of interim aliment. Abernethy reclaimed, and pleaded that it is the practice of the Commissary Court to give a wife an interim aliment, when defender, because innocence is presumed, and for the same reason to refuse it when she is pursuer.

PITFOUR. I gave a speedy judgment here, to save time at this late hour of the Session. I perused the writings before the Commissaries, so that I was master of the argument. I considered that, if I erred, the party had an opportunity of reclaiming. The lady is a woman of an excellent character, Lord Strichen's niece, and, according to the report of the country, has met with very bad usage.

[This was, one way or other, the most extraordinary argument that I ever heard from the bench. Lord Pitfour ought to have reported the case.]

GARDENSTON. If the practice of the Commissary Court is as represented, it is high time to correct it.

AUCHINLECK. In the last cause before us, the man pleaded *remissio injuriæ*, because the woman had not left his house. Here the woman has left the man's house, and he will not aliment her. Thus, if she stays, the objection will be, You have forgiven me ; if she goes, she must starve.

HAILES. Innocence is presumed. This is a presumption of law ; but it is also a presumption of law that what one undertakes to prove, is true, in questions of relevancy. These are no more than unimportant axioms. The short conclusion on the case is this, A woman cannot be obliged to live with the man from whom she concludes to be divorced ever since a period already past. If she cannot live with him, she must either be alimented *extra familiam*, or no woman will have it in her power to obtain justice against her husband.

On the 11th March 1774, "the Lords refused the petition after having heard parties, and adhered to Lord Pitfour's interlocutor."

Act. H. Dundas. *Alt.* Al. Abercrombie.

1774. June 21. ROBERT STEPHEN *against* GENERAL ABERCROMBIE.

MEMBER OF PARLIAMENT.

[*Folio Dict.*, III. 411 ; *Dictionary*, 8676.]

HAILES. I am satisfied that the determination given in this case is not inconsistent with the determination given in the *Forfar* case. In the *Forfar* case the Court did not approve of the proceedings of the minority, but they saw that those proceedings had been ratified by a general meeting, and therefore they sustained them. Thus the present question is entire, and there is no judgment of the Court either one way or other. Yet I think that the proceedings of the minority may in general be supported. The Commissioners were ordered to proceed in the division. The majority would not, but the minority did ; so that all that we have is one division made according to the injunction of the Court. The majority ought to have proceeded to a division, if not on the Duke of Gordon's *data*, yet on their own *data* : instead of that they threw away their votes, and agreed to sist procedure ; which is just the reverse of what they were bound to do. They overshot themselves. I suppose that next time they will be more on their guard. It is said that the majority not only sisted procedure, but sustained objections, and that the minority ought to have considered the objections as sustained, and then proceeded accordingly, notwithstanding the sist. But how could the minority split the judgment : it was a judgment not tending to expedite matters, but to delay. Had the majority considered that the sustaining the objections was an effectual part of the judgment, they would have proceeded to act upon the footing of the objections being sustained ; that is, they would have divided upon their own *data*. Besides, what is the meaning of sustaining objections which do not appear from the minute. They would not divide the valuation of the parish of Ruthven,

though, as to it, there was no objection ; so that their vote, however worded, was, in effect, a declaration that they would not proceed. In that case, the minority was authorised to proceed. It is vain for them to say that the Duke of Gordon would not allow his valuation to be divided unless according to his own *data*. They were the judges : he was a party : it was their duty to have proceeded in a division according to the *data* which seemed just to them, without regarding the opinion of a party.

COALSTON. The single question is, Whether was there a regular division here ? The meeting was legal, but the division was not the act of the meeting : it was not the act of the majority, but of the minority. Were this case to be determined on general principles, there is no doubt the only question is, Whether any thing in the interlocutor of the Court could establish this strange proposition, that the act of the minority must overrule the majority. Had the majority voted to *adjourn*, the interlocutor would have authorised the minority to *proceed* ; but the majority did not merely *sist* procedure, *it sustained objections*. How could the minority counteract this ? The only thing that occasions a difficulty is the case of *Forfar* : *It* would have applied to this case, had it not been for the ratification. In fact, it does not apply. At any rate, it is but a single decision.

JUSTICE-CLERK. I lay my opinion upon the words of the injunction, as explained in the case of *Forfar*. The injunction is as well framed as can be. [A compliment to Lord Auchinleck in the Chair.] There was a combination in the county of *Forfar* to disappoint Lord Panmure of this right which the law gave him. The purpose of the Court was to force justice. The after approbation of the general meeting could not have been of much weight, for the former meeting must either have had powers or not : If the *former*, the approbation was superfluous ; if the *latter*, unavailing. In the present case some gentlemen were resolved to meet and divide according to the injunction. A majority came with the determined resolution of stopping the division. *Which* party did wrong ? Was it the *minority*, who returned a division, or the *majority* who returned none ? We can pay no regard to the proceedings of a majority who disregarded our injunction.

COALSTON. When the majority and the minority differ, the only remedy lies in the Court.

MONBODDO. In the case of *Forfar* the majority had a pretence for not proceeding, namely, that there was no sufficient proof. Here the majority might have proceeded upon some *data* or other. This case, therefore, is much stronger than that of *Forfar*.

ALVA. It is plain that the majority meant to counteract the injunctions of the Court, not to expedite the division.

GARDENSTON. It was incumbent on the parties to obey the injunctions of the Court. The majority acted contrary to the injunctions of the Court. It is true that, in words, they *sustained objections* ; but this was only to get at their conclusion,—*to sist*. Had the majority taken a part in the deliberations, and, instead of objecting to what was done, proceeded to divide, the minority must have submitted. The division by the minority is the legal division, for there is no other.

AUCHINLECK. I have the same difficulty as Lord Coalston, yet my desire is to alter the interlocutor, because every thing done speaks out the intention of

the majority to disappoint the injunction : their sole view was *nihil agere*. I am sorry that we have given an advice to future politicians for their conduct,—that they go one step farther, and proceed to make an erroneous division.

KAIMES. The majority first sustained objections, and then sisted proceedings. Their sisting proceedings will not operate *retro*.

KENNET. It surely was not the intention of the Court to find that a minority could counteract a majority. The case of *Forfar* went upon this, that the proceedings of the minority were ratified by a general meeting. As to this case, the *first* objection is, that all parties having interest are not called. This is not good ; because it was competent, and omitted. *Second*, As to the actings of the minority, wherever the objection made depended on a proof not brought, the objection was frivolous. There is a difficulty as to the *Boat of Bogue*, for there the minority proceeded to repel an objection which the majority had sustained. The minority ought to have proceeded on the *data* of the majority.

COALSTON. I beg leave to qualify my opinion : when the majority gives an opinion, *that* must be the rule. There was no objection in the minutes as to the parish of Ruthven, and, consequently, that parish did not fall under the judgment of the majority.

On the 21st June 1774, “ The Lords found that, in this case, the minority did right in proceeding to a division ; and therefore altered their interlocutor of the 23d February 1774.”

Act. H. Dundas. *Alt.* D. Rae, &c.

Diss. As to Boat of Bogue, Kennet and Hailes.

Diss. As to all but Ruthven parish, Kaimes and Coalston.

1774. *June 22.*—The objection now made to the division of the valuation, was, that the feuars who had an interest were not called.

COALSTON. If the feuars are not bound to pay a certain share of the cess, they have an interest, and ought to have been made parties.

JUSTICE-CLERK. The former proceedings are inconsistent with this. The Court ordered the Commissioners of Supply to proceed in judging among the parties then in the field. The objection is extraordinary, for the feuars themselves do not object.

MONBODDO. Suppose some person had appeared and pleaded, that some one else than the Duke of Gordon was the proprietor, Could the freeholders have taken up such an objection, if repelled by the Commissioners ?

ALVA. However competent the objection may have been to the feuars, I do not think that it is competent to any one else.

COALSTON. I cannot enter into the distinction between the Commissioners of Supply and any other judges. I do not think that the objection is not now competent : the remit was only authorising the minority to act, but it was implied that they should act according to law. The objection is, that the feuars were not called, and also some claimants interested in the division.

GARDENSTON. The objection is very slight : there seems some ground for the distinction between gentlemen judges and judges who act by regular forms.

The question as to gentlemen judges must always be, whether are they materially wrong or materially right? Common sense is always law: they are not good judges who cannot reconcile them. If a man is overburdened, which is the true cause of complaint, or underburdened, which is the modern cause of complaint, he may seek redress; but he alone who is overburdened or underburdened is authorised to seek redress.

KATMES. Had the objection been made *in initio litis*, the Commissioners must have listened to it. If want of interest is good against a pursuer, it is good against an objector.

JUSTICE-CLERK. Petitions had been presented,—proofs ordered to be taken, and actually taken, without any objection. The objection ought to have been moved in the advocacy, or not at all: to sustain it now, would be inconsistent with the injunction. We have now an extracted decree of the Commissioners, *by which the cess is levied*. The freeholders say, We will disregard that decret. In many places, the tenants are bound to pay the cess. According to this rule, if any tenant, paying L.50 Scots of rent, is not called, the decree of division is intrinsically void. This country is already in confusion enough. To require so many parties, would introduce inextricable confusion.

STONEFIELD. The power of the Commissioners is altogether ministerial: they are not bound to call any parties. No form of citation is required. We had a recent example of that in the county of Forfar, where the collector moved to have a new division,—it was never objected that parties having entered were not called.

AUCHINLECK. This case is very difficult. The Act of Parliament has said, that every man shall have a vote who stands infeft in L.400 of valued rent. If a man is not legally subjected to that extent, he cannot have a vote: The quartering lies upon the vassals; consequently, they are liable. Commissioners of Supply are not tied down to strict accuracy; but still they are subject to rules. If they act without rules, how can we support their actings? The proof, in this case, goes for nothing, because in absence of the parties interested.

KENNET. The objection, that all claimants are not parties, is not good: but the objection, that all vassals were not called, is good. The *former* may be considered as repelled by implication; the *latter* not.

JUSTICE-CLERK. While the decret stands, the cess must be paid, according to that rule. Hence the vassals' lands are liable to public burdens to the extent of L.400.

On the 22d June 1774, "The Lords repelled that objection, that all parties having interest are not called."

Act. H. Dundas, &c. *Alt.* Ilay Campbell, &c.

Diss. Coalston, Kennet.



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